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In The Supreme Court Of The United States

OCTOBER TERM, 1995

HOLLY FARMS CORPORATION;
TYSON FOODS, INCORPORATED,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

CHAUFFERS, TEAMSTERS AND HELPERS, et al.,
Intervenors.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Volume One - Appendix to Writ of Certiorari

Charles P. Roberts III*
HAYNSWORTH, BALDWIN, JOHNSON AND GREAVES, P.A.
2709 Henry Street
Greensboro, NC 27405
(910) 375-9739

**** Counsel for Petitioners***

LAWYERS PRINTING COMPANY 7th & Franklin Bldg Richmond, Virginia 23219 (804) 648-3664

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PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Holly Farms Corporation;
Tyson Foods, Inc.
Petitioners,

v.
National Labor Relations
Board,
Respondent,

CHAUFFEURS, TEAMSTERS AND
HELPERS, Local 391, 29,
71, 355, 592, 657, 988,
and all affiliated with
the International Brother-
hood of Teamsters,
Intervenor.

National Labor Relations
Board,
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v.
Holly Farms Corporation;
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CHAUFFEURS, TEAMSTERS
AND HELPERS, Local 391, 29,
71, 355, 592, 657, 988
and all affiliated with
the International Brother-
hood of Teamsters,
Intervenor.

No. 93-1710

No. 93-1882

On Petition for Review
and Cross-application
for Enforcement of an Order
of the
National Labor Relations Board.
(11-CA-13184, 11-CA-13267,
11-CA-13520, 11-CA-13619,
11-RC 5583, 11-CA-13487)

Argued: April 12, 1994

Decided: March 10, 1995

Before MURNAGHAN and NIEMEYER,
Circuit Judges, and HARVEY,
Senior United States District Judge
for the District of Maryland,
sitting by designation.

Order enforced by published opinion.
Judge Murnaghan wrote the opinion, in
which Senior Judge Harvey joined.
Judge Niemeyer wrote an opinion con-
curring in part and dissenting in
part.

COUNSEL

ARGUED: Charles Preyer Roberts, III,
HAYNSWORTH, BALDWIN, JOHNSON &
GREAVES, Greensboro, North Carolina,
for Petitioners. Frederick Lee Corn-
nell, Jr., NATIONAL LABOR RELATIONS
BOARD, Washington, D.C., for Respon-
dent; John David James, SMITH, FOLLIN
& JAMES, Greensboro, North Carolina,
for Intervenor. **ON BRIEF:** William

R. McKibbon, Jr., D. Christopher Lauderdale, HAYNSWORTH, BALDWIN, JOHNSON & GREAVES, Greenville, South Carolina, for Petitioners. Jerry M. Hunter, General Counsel, Yvonne T. Dixon, Acting Deputy Attorney General, Nicholas E. Karatinos, Acting Associate General Counsel, Aileen A. Armstrong, Deputy Associate General Counsel, Frederick C. Havard, Supervisory Attorney, NATIONAL LABOR RELATIONS BOARD, Washington, D.C., for Respondent.

OPINION

MURNAGHAN, Circuit Judge:

Holly Farms Corporation and Tyson Foods, Inc. ("Holly Farms" and "Tyson"—collectively, "the Company") have petitioned for review of a decision and order of the respondent, the National Labor Relations Board ("NLRB" or "the Board"), which found that the Company had committed unfair labor practices in violation of §§ 8 (a)(1), (3), and (5) of the National Labor Relations Act ("the Act"), 49

Stat. 449, as amended, 29 U.S.C. §§ 158(a)(1), (3) and (5). *Holly Farms Corp.*, 311 N.L.R.B. 273 (1993). The NLRB has cross-applied for enforcement of its order, and the Chauffeurs, Teamsters and Helpers Local Union Nos. 29, 71, 355, 391, 592, 657, and 988 (collectively, "the Union") have intervened as respondents.

I

Tyson is engaged in the production, processing, and transportation of poultry. Tyson operates production facilities, as well as transportation terminals between Texas and North Carolina. From those terminals, drivers in Tyson's transportation department transport its poultry

products to customers throughout the United States.

As of October 1988, Holly Farms was engaged in the production, processing, and transportation of poultry at its headquarters facility in Wilkesboro, North Carolina, and at other facilities in North Carolina, Virginia, and Texas. At that time, Tyson submitted a bid to purchase Holly Farms' stock.

On July 18, 1989, Tyson acquired a controlling interest in Holly Farms, but Holly Farms continued its existence as a corporate entity. Holly Farms' business operations remained virtually unchanged for about two months. Eventually, Holly Farms announced that Tyson had decided to in-

tegrate part, but not all, of Holly Farms' operations into its own.

In December 1988, while Tyson's bid to purchase Holly Farms' stock was pending, the Union launched organizing campaigns in three separate units of Holly Farms employees. One of those units consisted of production employees at the Wilkesboro facility and elsewhere. The second unit ("the drivers-yardmen unit") consisted of drivers and yardmen at several facilities in Holly Farms' transportation department. And the third unit ("the live-haul unit") consisted of the Wilkesboro facility's live-haul crews and various workers at Holly Farms' facility in Roaring River, North Carolina.

The Board found that Holly Farms committed numerous unfair labor practices during those three organizing campaigns. *See Holly Farms Corp. v. NLRB, supra*. Many of the Board's findings are uncontested here. For example, it is uncontested that, during the Union's organizing campaign in the drivers-yardmen unit, Holly Farms officials, including its President, repeatedly threatened that Holly Farms would eliminate the transportation department and terminate all of its employees if the Union won the election. Even after the Union won the election and was certified to represent the unit, Holly Farms threatened employees with arrest for handing out union literature, and then it actually had three employees

arrested when they distributed union literature in a company parking lot. In addition, the Company unlawfully discharged four pro-union activists in the production employees unit who had asked their co-workers to sign union authorization cards or to support the Union.

The Company does not dispute the above-described unfair labor practices, and the Board's order with respect to those uncontested violations can be summarily enforced. *See NLRB v. Frigid Storage, Inc.*, 934 F.2d 506, 509 (4th Cir. 1991). Of those findings that the Company does dispute, some are clearly supported by substantial evidence. Only two of the issues presented in the Company's petition for review merit extended

discussion: (1) whether Tyson violated any duty that it may have had to bargain with the Union regarding the drivers-yardmen unit; and (2) whether the workers in the live-haul unit were "employees" protected by the Act or "agricultural laborers" excluded from the Act's coverage.

II

The Board's findings are conclusive "if supported by substantial evidence on the record considered as a whole." 29 U.S.C. § 160(e). A reviewing court "may [not] displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera*

Corp. v. NLRB, 340 U.S. 474, 488 (1951).

III

The first question presented is whether Tyson violated any duty that it may have had to bargain with the Union regarding the wages, hours, and other terms and conditions of employment for members of the drivers-yardmen unit. That question, in turn, can be divided into two sub-questions: whether (and, if so, when) Tyson had a duty to bargain with the Union; and whether Tyson violated that duty by unilaterally setting the terms and conditions of employment for Holly Farms employees who joined Tyson's newly-integrated transportation department.

A

On March 24, 1989, following a Board-conducted election, the Union was certified to represent Holly Farms employees in the drivers-yard-men unit. Thereafter, the Union and Holly Farms bargained unsuccessfully for a contract. On July 18, 1989, Tyson acquired a controlling interest in Holly Farms' stock. For the next two months—until Tyson converted some of the drivers and yardmen to its own payroll on September 22—Tyson did not make any significant changes in Holly Farms' business operations.

By September 11, Tyson had decided to integrate the entire Holly Farms transportation department into its own transportation department. The

following day, Holly Farms announced that decision to the Union. Holly Farms also announced to the employees —without bargaining with their duly elected Union representative—that they would be offered jobs as Tyson employees, under Tyson's pay plan and working conditions, which were substantially different from, and at least arguably inferior to, those of Holly Farms. Holly Farms also stated that its transportation department would no longer exist after the integration and that, therefore, the Union no longer represented the employees. Subsequently, Tyson sent the employees letters which offered them jobs as Tyson employees, on Tyson's terms, and which required them to respond by September 22. Forty-

seven of the unit employees refused the offer because of those terms and lost their jobs as of September 22.

The Board found that Tyson came under a duty to bargain with the Union at the time of the stock purchase (on July 18, 1989) and that thereafter Tyson committed numerous violations of § 8 of the Act. We hold that the evidence supports those findings.

B

Section 8(a)(5) of the Act, 29 U.S.C. § 158()(5), in conjunction with § 9(a) of the Act, *id.* § 159(a), makes it an unfair labor practice for an employer to refuse to bargain with the union selected by the majority of its employees in an appropriate unit. A union that is certified by the

Board after winning a Board-conducted election is entitled to a "conclusive presumption" of majority support among the employees for one year after certification. *See Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 37 (1987). Accordingly, absent unusual circumstances, an employer violates § 8(a)(5) by withdrawing recognition from a union during its certification year. *See id.* at 37-39; *Brooks v. NLRB*, 348 U.S. 96, 98-99 (1954).

The Board and Petitioners agree that on March 24, 1989, the Union became certified to represent certain Holly Farms employees. Thus Holly Farms had a duty to recognize and bargain with the Union until March of 1990. Further, the most recent Su-

preme Court case involving these issues explains:

> "[A] mere change of employers *or of ownership* in the employing industry is not such an 'unusual circumstance' as to affect the force of the Board's certification within the normal operative period if a majority of employees after the change of *ownership* or management were employed by the preceding employer."

Fall River, 482 U.S. at 37 (quoting *NLRB v. Burns Int'l Security Servs., Inc.*, 406 U.S. 272, 279 (1972) (emphasis added)). Here, the new owner, Tyson, employed exclusively Holly Farms employees in unchanged Holly Farms units for two months. Thus the force of the Union's certification remained in effect.

When there is "substantial continuity" between a new business enterprise and a previous enterprise, a

new employer may be obligated to recognize and bargain with a certified union which represented the employees while they worked for the predecessor employer. *See Fall River*, 482 U.S. at 43; *Burns*, 406 U.S. at 277-81; *Zady Natey, Inc. v. United Food and Commercial Workers Int'l Union*, 995 F.2d 496, 498 (4th Cir.), *cert. denied*, 114 S. Ct. 470 (1993). Such a new employer has been termed a "successor." *E.g., Fall River*, 482 U.S. at 41; *Burns*, 406 U.S. at 284. If the new employer is not an entirely separate corporate entity, but rather has purchased the stock of the predecessor employer, the new employer may be further obligated to adhere to the terms of any existing collective bargaining agreement ("CBA") between the

predecessor employer and the union. *See, e.g., Burns*, 406 U.S. at 291 ("[I]n a variety of circumstances involving a merger, stock acquisition, reorganization, or assets purchase, the Board might properly find as a matter of fact that the successor had assumed the obligations under the old contract.") (dicta); *Esmark, Inc. v. NLRB*, 887 F.2d 739, 751 (7th Cir. 1989); *see also Hendricks-Miller Typographic Co.*, 240 N.L.R.B. 1082, 1085 (1979) (holding that a new stockowner inherits the previous owner's obligations to employees, specifically obligations formed by corporation membership in a multiemployer unit). Some have called such an employer a "successor," *Burns*, 406 U.S. at 291 (dicta); others have re-

jected this terminology in light of the fact that an ordinary "successor" is not bound by any existing CBA, *Esmark*, 887 F.2d at 751; *Hendricks-Miller*, 240 N.L.R.B. at 1085. *See also Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 180 (1973) (referring to a purchaser of a business as a "successor," but calling the business itself a "continuing business enterprise"). When the predecessor employer continues as a corporate entity, that employer remains bound by its existing duties to the union, and has been called a "continuing employer." *EPE, Inc. v. NLRB*, 845 F.2d 483, 487 (4th Cir. 1988). In such a situation, both the "continuing employer" and the new stockowner have joint simultaneous duties to the

union. *See Miami Foundry Corp. v. NLRB*, 682 F.2d 587, 589 (6th Cir. 1982) (per curiam) (holding a new managing corporation and two stockholders, one owning 59 percent of the corporation and one owning the remainder, to be three joint employers, jointly under a duty to negotiate with the union which had been formed earlier, at a time when the employees were employed by only one of the stockholders).

In the instant case, the Board found that Tyson became a "successor" to Holly Farms as of July 18, 1989, the date that Tyson purchased Holly Farms' stock. In our review, we "must defer to the NLRB's application" of successorship principles "so long as it is rational and not incon-

sistent with the [Act]." *EPE*, 845 F.2d at 489-490 (quoting *United Food and Commercial Workers Int'l Union v. NLRB*, 768 F.2d 1463, 1470 (D.C. Cir. 1985)). Looking beyond the terminology to the principles at play here,

> "[t]he real question in each of these 'successorship' cases is, on the particular facts, what are the legal obligations of the new employer to the employees of the former owner or their representative. The answer to this inquiry requires analysis of the new employer and of the policies of the labor laws . . . . There is, and can be, no single definition of 'successor' which is applicable in every context."

NLRB v. General Wood Preserving Co., 905 F.2d 803, 819 (4th Cir.) (quoting *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249, 262 n. 9 (1974)), *cert. denied*, 498 U.S. 1016 (1990). Whatever terms we use—whether we

call Tyson a "successor," or a "new stockowner," or a "joint employer"—substantial evidence and the policies of the labor laws support the Board's finding here that Tyson came under a duty to bargain with the Union when it purchased Holly Farms. Although Tyson might also be obligated to adhere to the terms of any existing CBA, *see, e.g., Esmark*, 887 F.2d at 751, we need not decide that issue, as no CBA yet existed between the Union and Holly Farms.

Although the Supreme Court has yet to decide the question, the policies behind the labor laws compel the finding that a new stockowner acquires the duty to bargain with an existing union at the time of a stock transfer. The policy underlying the

National Labor Relations Act is to promote industrial peace. *E.g., EPE*, 845 F.2d at 489. The successorship doctrine as expressed in *Burns, supra*, 406 U.S. 272, seeks to promote this policy "by forestalling the employee frustration that could result if employees found themselves in substantially the same job, but deprived of the representation of their union." *EPE*, 845 F.2d at 489, citing *Fall River*, 482 U.S. at 38. From the perspective of the employees, a stock transfer is simply a shell game; as we explained in *EPE, supra*:

> [I]ndustrial peace may suffer if workers find themselves working at the same job for the same corporation, but suddenly deprived of the benefits of a collective bargaining agreement as the result of a stock transaction that, from the workers' point of

> view, appears little more than an artifice.
>
> Every change in corporate ownership cannot raise the specter of disruption in the labor relations of the company being bought or sold.

845 F.2d at 489. The Supreme Court has expounded further, in holding that an arbitration clause of a collective bargaining agreement between a union and an employer binds a "successor employer" who merges the first employing corporation into its own:

> Employees, and the union which represents them, ordinarily do not take part in negotiations leading to a change in corporate ownership. The negotiations will ordinarily not concern the well-being of the employees, whose advantage or disadvantage, potentially great, will inevitably be incidental to the main considerations. The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship. . . .
>
> . . . While the principles of law governing ordinary contracts would not bind to a contract an unconsenting successor to a contracting party, a collective bargaining agreement is not an ordinary contract. . . .

John Wiley & Sons v. Livingston, 376 U.S. 543, 549-50. Moreover, "the usual corporate law rule is that the contracts of a corporation remain in effect despite a sale of the corporation's stock." *Esmark*, 887 F.2d at 751; *see also John Wiley*, 376 U.S. at 550 n. 3.

In light of these labor policy concerns, the evidence amply supports

the Board's finding that as of July 18, 1989, the date that Tyson purchased the Holly Farms' stock, Tyson came under a duty to bargain with the Union previously formed by Holly Farms employees. For two months after the purchase, Tyson made no significant changes in Holly Farms' operations. Holly Farms—under Tyson's ownership—continued to engage in the same business operations at the same locations, selling the same products to the same customers, and it retained all of its employees under the same supervision and the same wages, hours, and working conditions. Those facts establish substantial continuity between Holly Farms and Tyson. In view of that continuity, the employees would "understandably

view their job situations as essentially unaltered," and could reasonably be expected to continue their support for the Union. *Fall River*, 482 U.S. at 43; *accord General Wood Preserving Co.*, 905 F.2d at 819, *Nephi Rubber Prods. Corp. v. NLRB*, 976 F.2d 1361, 1364-66 (10th Cir. 1992); *cf. NLRB v. Dent*, 534 F.2d 844, 846 n.2 (9th Cir. 1976) (because the successor had preserved the predecessor's wage rates for just two weeks following a takeover, the successor could not thereafter alter those rates unilaterally).

Additionally, the employees at issue here were frustrated in their attempts to negotiate with their employer by the fact that Tyson did not negotiate with their Union. Holly

Farms suspended serious negotiations with the Union while Tyson was in the process of purchasing Holly Farms' stock. The recently unionized employees remained in identical jobs, yet were left in limbo, no employer having offered to negotiate with their Union. Therefore, the Board reasonably found that Tyson came under a duty to negotiate with the union as an employer ("successor" or otherwise) in July 1989.[1]

[1] Other federal appellate courts have come to similar conclusions in the stock purchase context. *See, e.g., United Food & Commercial Workers Int'l Union*, 768 F.2d at 1474 (D.C. Cir) (reversing, for lack of substantial evidence, National Labor Relations Board decision that a new stockowner was not a "successor" employer, with duties to an existing union); *Miami Foundry Corp.*, 682 F.2d at 589 (6th Cir.) (holding new stockowners and managers under a duty to bargain with pre-existing union).

C

Next we must determine whether Tyson violated its duty to bargain with the Union when it unilaterally set certain terms and conditions of employment for members of the drivers-yardmen unit. We conclude that the Board's finding that Tyson violated § 8 of the Act was supported by substantial evidence.

An employer's duty to bargain with its union encompasses the obligation to bargain over the following mandatory subjects—"wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d); *see id.* § 158(a)(5). That obligation includes a duty to bargain about the "effects" on employees of a management decision that is not itself sub-

ject to the bargaining obligation. *See First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 679-82 (1981); *NLRB v. Litton Fin. Printing Div.*, 893 F.2d 1128, 1133-34 (9th Cir. 1990), *rev'd in part on other grounds*, 501 U.S. 190 (1991). Where changes in employee working conditions constitute such a bargainable effect, an employer violates §§ 8(a)(5) and (1) of the Act by implementing those changes without bargaining with the union. *See Litton*, 893 F.2d at 1133-34. The employer also violates §§ 8(a)(5) and (1) if it negotiates directly with its employees, rather than with their union representative, about such changes. *See EPE*, 845 F.2d at 491.

On September 12, 1989, the Company announced that the employees in the drivers-yardmen unit would be offered jobs as Tyson employees under *Tyson's* working conditions. That announcement plainly changed a wide range of matters—including wages, hours, work rules, work schedules, and work locations—that go to the heart of the bargaining obligation under § 8 of the Act. The Company announced those changes in conjunction with its announcement of its integration decision, merging Holly Farms' and Tyson's transportation departments. Thus, the Board concluded, the changes and the offer to employees to work under those changes were "effects" of the integration decision

and were subject to the duty to bargain.

Following the announcements of September 12, the Company sent letters to the employees offering them jobs as Tyson employees under Tyson's working conditions, and it met with groups of employees to discuss those working conditions. The Company did not give the employees the option of remaining employed under their existing working conditions. Forty-seven drivers who refused the offer because it included Tyson's working conditions lost their jobs. Thus, the Company bypassed the Union and negotiated directly with the employees about their working conditions; and, as a result, forty-seven members of

the drivers-yardmen unit lost their jobs.

The Company and the Board have agreed that the decision to integrate the two transportation departments was a management decision that was not itself subject to the bargaining obligation. The Company has argued that the establishment of new working conditions for the Holly Farms employees was an integral part of that management decision. The Board has countered that the working conditions were "effects" of that decision, rather than intrinsic parts of the decision itself, and therefore were subject to the duty to bargain.

The Supreme Court in *First National Maintenance, supra,* enunciated a distinction between "economically-

motivated" management decisions, 452 U.S. at 680, and the "effects" of those decisions. *Id.* at 677 n.15, 682. In *Litton, supra*, the Ninth Circuit expounded upon that distinction. On the one hand, there is the management decision itself, including any subject that is "'inexorably'" intertwined with, or the "inevitable consequence" of, that decision. 893 F.2d at 1133 n.3, 1134 (quoting *First Nat'l Maintenance*, 452 U.S. at 677). For example, when a company decides to shut down a plant entirely, the resulting layoff of the plant's workers may be an "inevitable consequence" of the decision itself. On the other hand, there may be mere "effects," which are "*not the inevitable consequence* of the underly-

ing management decision." *Id.* at 1134 (emphasis added). Where a company had feasible alternatives that it could have explored with the union, without reconsidering its underlying management decision, those alternatives are mandatory subjects of bargaining. The mere fact that the alternatives may increase labor costs does not make them "infeasible." *See id.* (citing *First Nat'l Maintenance*, 452 U.S. at 680).

Here, it was not inevitable for the Company to impose Tyson's pay plan and working conditions upon Holly Farms' drivers. Generally, Tyson's pay plan provided the truck drivers with lower pay per mile but somewhat higher pay per delivery, or "drop," than Holly Farms' pay plan.

We are not convinced that the substitution of Tyson's pay structure for Holly Farms' was an "inevitable consequence" of the management decision to integrate the two transportation departments. Furthermore, as Tyson concedes, it tried to accommodate the drivers' individual preferences as to the duration and mileage of their hauls, which tended to be much longer under Tyson's system than under Holly Farms'—a major point of contention between the Company and the drivers. From those facts alone, it was reasonable for the Board to infer that there was room for bargaining over the drivers' working conditions, had Tyson been willing to bargain. Therefore, the Board reasonably concluded that the changes unilaterally

established by Tyson concerned mandatory subjects of bargaining—"effects" of the nonbargainable decision to integrate Tyson's and Holly Farms' transportation departments. Accordingly, we enforce the Board's order to the extent that it found Tyson's refusal to bargain with the Union to be a violation of the Act.

IV

The other significant question presented for review is whether any of the employees in the live-haul bargaining unit fell outside the coverage of the Act. The Company has argued that the unit was inappropriate because it contained "agricultural laborers," who are not subject to the Act. Therefore, the Company has contended, the Board committed an er-

ror of law when it approved the bargaining unit.[2]

On review, our function is a "limited" one. *Bayside Enters., Inc. v. NLRB*, 429 U.S. 298, 304 n.14 (1977) (quoting *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 131 (1944)). The Board's determination that the employees in the live-haul bargaining unit were covered by the Act "'is to be accepted if it has "warrant in the record" and a reasonable basis in law.'" *Bayside*, 429 U.S. at 304 n.14 (quoting *Hearst Publications*, 322 U.S. at 131). Regardless of how we, as a federal court,

[2] The Company also has contended that the Board compounded that error when it issued a bargaining order in the live-haul unit pursuant to *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), and when it recognized unfair labor practices aimed at employees in that unit.

might have resolved the question as an initial matter, we must give appropriate weight to the judgment of the Board, whose special duty is to apply the Act's broad statutory language to an almost unlimited variety of fact patterns. *See Bayside*, 429 U.S. at 304; *cf. NLRB v. United Ins. Co.*, 390 U.S. 254, 260 (1968); *NLRB v. Coca-Cola Bottling Co.*, 350 U.S. 264, 269 (1956); *Universal Camera Corp.*, 340 U.S. at 488; *NLRB v. Pilot Freight Carriers, Inc.*, 558 F.2d 205, 207-08 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978).

A

The live-haul unit, as approved by the Board, consisted of two groups of North Carolina employees: the Wilkesboro facility's live-haul

crews; and the Roaring River facility's feed mill employees, feed-haul drivers, and mechanics. The Company has conceded that the Roaring River workers were statutory "employees" protected by the Act. The Company's sole claim of error is that the live-haul workers at the Wilkesboro facility—*i.e.*, the live-haul truck drivers, forklift operators, and "chicken catchers"—were agricultural laborers, who fall outside the Act's coverage and therefore should not have been included in the bargaining unit.

The Wilkesboro plant is a vertically integrated poultry operation. In its hatchery operations, Holly Farms hatches pullets, or laying hens. At twenty weeks of age, the

pullets are transferred to "laying houses" operated by independent "contract growers." The eggs produced by the pullets are transported back to the Holly Farms hatchery operations, where they are hatched. The Company transports the resulting chicks to independent contract growers who are paid to raise the chicks into full-grown broiler chickens. When the birds are seven weeks old, the live-haul crews catch, cage, and transport them to a storage and cooling area near the processing plant, where they will be slaughtered and prepared for market.

The employees in the live-haul unit serve as the Wilkesboro facility's chicken-catching crews. A crew consists of a live-haul truck driver,

a forklift operator, and about nine "chicken catchers."[3] The live-haul driver drives a flat-bed truck, which carries the entire crew to the farms of the independent contract growers who raise the broiler chickens. Under cover of darkness, the chicken catchers manually catch and cage the chickens, the forklift operator places the steel cages on the flat-bed truck, and the truck delivers the chickens to a storage area near the Company's processing plant.

B

The protections of the Act extend only to statutory "employees." Section 9(a) of the Act provides that "[r]epresentatives designated or se-

[3] The entire bargaining unit consists of 27 live-haul drivers, 12 forklift operators, and 118 chicken catchers.

lected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit." 29 U.S.C. § 159(a). A unit cannot be deemed appropriate unless it is comprised of individuals who are "employees" within the meaning of the Act.

Section 2(3) of the Act defines the term "employee" to exclude "any individual employed as an agricultural laborer." 29 U.S.C. § 152(3). Section 2(3)'s exemption for "agricultural laborer[s]" must be narrowly construed, to favor the workers for whose protection the Act was designed. *See NLRB v. Cal-Maine Farms, Inc.*, 998 F.2d 1336, 1339 (5th Cir.

1993) (citing *Wirtz v. Ti Ti Peat Humus Co.*, 373 F.2d 209, 212 (4th Cir.), *cert. denied*, 389 U.S. 834 (1967)).

The term "agricultural laborer" has the meaning specified in § 3(f) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 203(f). *Bayside*, 429 U.S. at 300 & n.6. That provision states that "agriculture" encompasses "farming in all its branches," including "the raising of . . . poultry, and any practices . . . performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market." 29

U.S.C. § 203(f); *see Bayside*, 429 U.S. at 300.

Under that provision, agriculture is defined "in both a primary and a secondary sense." *Bayside*, 429 U.S. at 300. The primary meaning encompasses "farming in all its branches," including the raising of poultry. *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 762 (1949); *accord Bayside*, 429 U.S. at 300 n.7. The secondary meaning encompasses a wider range of practices, so long as they are linked in specific ways to primary agriculture. *See Bayside*, 429 U.S. at 300 n.7, 301; *Farmers Reservoir*, 337 U.S. at 762-63. Thus, the secondary meaning "includes any practices, whether or not themselves farming practices, which are per-

formed either by a farmer or on a farm, incidentally [sic] to or in conjunction with" primary farming operations. *Farmers Reservoir*, 337 U.S. at 763; *accord Bayside*, 429 U.S. at 300 n.7.

Under the express language of the FLSA, an employer that raises poultry on its own farm is engaged in primary agriculture. *See* 29 U.S.C. § 203(f). However, "'when an employer contracts with independent growers for the care and feeding of the employer's chicks, the employer's status as a farmer engaged in raising poultry ends with respect to those chicks.'" *Bayside*, 429 U.S. at 302 n.9 (quoting *Imco Poultry*, 202 N.L.R.B. 259, 260 (1973)).

C

The Company has conceded that the employees in the live-haul unit are *not* engaged in primary agriculture. Rather, the Company has claimed that the employees' work amounts to secondary agriculture. The Board rejected that claim.

In reviewing the Board's decision, we must distinguish between chicken catchers and forklift operators, on the one hand, and live-haul drivers, on the other hand. The Company's strongest argument concerns the former employees, who, the Board concedes, work "on a farm," within the meaning of the statute. 29 U.S.C. § 203(f). Therefore, with regard to the chicken catchers and forklift operators, we must determine whether

the activities of catching, caging, and loading live chickens onto a truck for delivery are clearly performed as an incident to or in conjunction with the primary farming operation of raising poultry.

The Company has argued that the chicken catchers and forklift operators' work is closely linked to the independent contract growers' primary agricultural activity of raising poultry. By the Company's account, because the chicken catchers and forklift operators perform "on a farm," and because they perform work that is incidental to the independent grower's farming activities on that farm, they must be deemed "agricultural laborers."

The NLRB has countered that the chicken catchers and forklift operators are not engaged in secondary agriculture because, by the time they perform their work on the broiler chickens, their employer—Holly Farms—is no longer engaged in primary agriculture with respect to those chickens. Long before the chicken catchers catch and cage the birds, the Company has turned the broiler chicks over to independent contract growers and the Company's status as a farmer engaged in raising poultry (a primary agricultural activity) has ended with respect to those chicks. *See Bayside*, 429 U.S. at 302 n.9; *Imco Poultry*, 202 N.L.R.B. at 260. Thus, the Board has reasoned, the employees' activities are neither

incidental to nor in conjunction with *Holly Farms'* primary agricultural practices and, therefore, the employees' work cannot amount to secondary agriculture.

The case at bar is not one of first impression. The Board's position here is perfectly consistent with those it has taken in similar cases. *See, e.g., Draper Valley Farms, Inc.*, 307 N.L.R.B. 1440 (1992) (rejecting a poultry company's contention that its "chicken catchers" were engaged in primary or secondary agricultural activity, and stating that, "[w]hen employers have claimed that employees are agricultural laborers because they are engaged in activity incidental to or in connection with farming operations (the

secondary definition of agriculture), the courts have generally rejected the claimed agricultural status when the employees in question were handling or working on agricultural products raised on farms other than their own employer's"); *see also Seaboard Farms of Kentucky, Inc.*, 311 N.L.R.B. No. 159 (1993) (requiring a poultry company to bargain with a unit that included the company's "chicken catchers, . . ., live haul drivers, [and] forklift operators").

Furthermore, other federal appellate decisions, squarely on point, have held that employees in chicken-catching crews were statutory "employees," not "agricultural laborers." *See NLRB v. Hudson Farms, Inc.*, 681 F.2d 1105, 1106 (8th Cir.

1982) (per curiam), *cert. denied*, 459 U.S. 1069 (1982) (holding that "truck drivers and yard workers [who] transport [an integrated poultry producer's] poultry between independent contract growers, which raise the chickens to market weight, and the company's processing plant" were "employees," rather than "agricultural laborers," under the Act); *Valmac Indus. v. NLRB*, 599 F.2d 246, 247, 249 (8th Cir. 1979) (holding that, because a company's "live chicken haulers and chicken catchers" "transported product *away* from the farm, their work was neither 'primary' nor 'secondary' farming," and that they therefore were "employees" within the

meaning of the Act (emphasis added)).[4] We affirm the Board's conclusion that none of the employees in the live-haul bargaining unit were agricultural laborers, because that conclusion is based on a reasonable interpretation of the Act and is consistent both with the Board's prior decisions and with federal appellate case law.

V

We have considered the remaining arguments in the Company's petition for review and find them meritless. Accordingly, the Company's petition

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[4] We decline to follow the case cited by the dissent, *Coleman v. Sanderson Farms, Inc.*, 629 F.2d 1077 (5th Cir. Unit A 1980). The Fifth Circuit's decision that "loader operators and live haul drivers" for a poultry company were "employees employed in agriculture," and thereby exempt from *FLSA*'s overtime provisions, *id.* at 1078, fails to give proper weight to the judgment of the Board, *see Bayside*, 429 U.S. at 304.

for review is denied, and the order of the Board is

ENFORCED.

NIEMEYER, Circuit Judge, concurring in part and dissenting in part:

The National Labor Relations Board (the Board) found that Holly Farms Corporation violated sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act (NLRA) in connection with a representation election in the spring and summer of 1989. It also found that after Tyson Foods, Incorporated, acquired all the stock of Holly Farms, both Tyson Foods and Holly Farms violated sections 8(a)(1), 8(a)(3), and 8(a)(5) in connection with Tyson's disbanding Holly Farms' transportation operations and integrating Holly Farms' truck drivers into Tyson's existing transportation operations. Generally, I agree with the majority's opinion that the findings of fact by the Administrative Law Judge (ALJ), as affirmed by the Board, are supported by substantial evidence and, therefore, I agree that these factual findings should be affirmed under the appropriate standard of review. *See* 29 U.S.C. § 160(e).

While I do not take issue with the purely factual findings, I nevertheless believe that the Board erred in two significant respects in applying the law. First, I believe that the Board erred as a matter of law when it concluded that chicken catchers, fork lift operators, and live-haul drivers were properly included in the

bargaining unit. Instead, I would find that these individuals were agricultural employees excluded from coverage by the NLRA. Second, on an issue that has far greater ramifications for our labor law jurisprudence than this first narrow dispute over definitions, the majority opinion significantly misconstrues the law of successorship liability when it refuses to recognize the existence of two separate corporate entities for the two months after the stock purchase by Tyson. I submit that Tyson was not liable as a successor employer when it purchased 100% of the stock of Holly Farms Corporation on July 18, 1989, because Holly Farms Corporation continued as a separate entity and remained as a continuing

employer for two months, with no change in its relationship with its employees. Tyson did succeed Holly Farms in September 1989 when it merged Holly Farms' operation into its own, and thus became a substitute employer of Holly Farms' former employees. However, even then, Tyson did not incur successor liability under the NLRA, because the restructuring, undertaken for independent and valid economic reasons, was so substantial that an appropriate bargaining unit did not survive. On these two matters, I would grant the employer's petition for review and deny enforcement of the order to the extent it depends on these erroneous conclusions by the Board. In all

other respects, I concur in the majority opinion.

I

Holly Farms Corporation was an integrated poultry business, engaged in raising, processing, and distributing poultry products. As part of its operations, it hatched chickens and placed them with contract farmers to raise them until the chickens were "harvested" by Holly Farms employees. Holly Farms employed 118 chicken catchers, 12 fork lift operators, and 27 live-haul drivers who, as a group, were responsible for driving to the farms, catching chickens, loading them, and transporting them back to the plants for processing. As found by the ALJ, the chicken catchers went

> to the farms where the chickens were raised where,

> under cover of darkness, [they] would continuously catch chickens with their hands and cage them during shifts of indeterminate duration, which continued until the task was completed.

The fork lift operators worked on the farms with the chicken-catchers and were responsible for placing steel cages loaded with chickens onto live-haul trucks. The live-haul drivers drove the crew from the plant to the farms and, after the chickens were caught and the cages were loaded, transported the chickens back to the plant for processing. Occasionally, live-haul drivers assisted the chicken catchers in the "harvesting." All of these employees, I submit, were agricultural employees, as defined by the NLRA, and therefore

were excluded from the Act's coverage.

The NLRA excludes from its definition of "employee" any individual employed as an "agricultural laborer." 29 U.S.C. § 152(3). Thus, agricultural laborers are not protected by section 8(a)(1), 8(a)(3), or 8(a)(5) of the NLRA. The definition of an agricultural laborer is to be derived from § 3(f) of the Fair Labor Standards Act. *See Bayside Enterprises, Inc. v. NLRB*, 429 U.S. 298, 300 n.6 (1977). The Fair Labor Standards Act defines "agriculture," in pertinent part, to include:

> farming in all its branches and among other things . . . the raising of livestock . . . or poultry, and any practices . . . performed . . . on a farm as an incident to or in conjunction with such farming

> operations, including preparation for market, delivery to storage, or to market or to carriers for transportation to market.

29 U.S.C. § 203(f).

In this case, the work of chicken catchers and fork lift operators was performed "on a farm as incident to or in conjunction with such farming operations" and therefore clearly qualifies these individuals as "agricultural laborers." Moreover, all these chicken catchers, fork lift operators, and live-haul drivers were involved in "preparation for market" and "delivery to storage or to market." Because they were engaged as agricultural laborers, these employees are not covered by the National Labor Relations Act. *See Coleman v. Sanderson Farms, Inc.*, 629 F.2d 1077,

1081 (5th Cir. 1980). *But see*, at least as to live-haul drivers, *NLRB v. Hudson Farms, Inc.*, 681 F.2d 1105 (8th Cir.), *cert. denied*, 459 U.S. 1069 (1982).

II

With respect to the second error of law committed by the Board, the facts were stipulated by the parties. Tyson acquired 100% of the stock of Holly Farms on July 18, 1989, but Holly Farms nevertheless continued in business for two months without change, under the same management and with the same employees. The two corporations remained separate corporations, and the only change Holly Farms experienced was in stock ownership. These facts were recognized by the Board. It stated, "[F]or 2

months following the purchase *nothing changed for the former Holly Farms employees*, all of whom were retained on the payroll under their existing wages, hours, and terms and conditions of employment." (Emphasis added.) Thus, from the employees' point of view, they still worked for Holly Farms under the same conditions that existed before the stock purchase.

Necessarily following from these acknowledged facts is the fact that Holly Farms alone retained the obligation to bargain with the union, and it did so. Correspondingly, Tyson, as the sole stockholder of Holly Farms, which at the time had implemented no changes in Holly Farms' operations, had no obligation to bar-

gain. It was a separate corporation and therefore *had not succeeded* to any obligation of Holly Farms to bargain simply by buying Holly Farms' stock. As was stated by the Seventh Circuit in *Esmark, Inc. v. NLRB*, 887 F.2d 739 (1989):

> The successorship doctrine is simply inapplicable to a stock sale transaction. In the successor context, the question is whether two different corporate entities, one succeeding to the other's business, are bound in like measure by a contract executed by only one of them; however "the stock transfer involves no break or hiatus between two legal entities, but is, rather, the continuing existence of a legal entity, albeit under new ownership." The successorship doctrine is therefore of no relevance to the present case, which involves a transfer of stock ownership in the employing corporation from one party to another.

Id. at 751 (footnote omitted). This statement from *Esmark* is simply a restatement of the successorship doctrine established by the Supreme Court in *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972). In *Burns*, the Court concluded that a corporation that *succeeded* another corporation as the employer of a specific work force may have the obligation to bargain with the union certified when the employees were employed by the previous corporation. The obligation arises for the successor corporation "when it select[s] as its work force the employees of the *previous* employer to perform the same tasks at the same place they had worked in the past." *Id.* at 278 (emphasis added). There

must be a change of employer so that one supplants the other. Obviously, if the previous corporation continues in its existing form as the employer, no succession occurs. Consequently, when Tyson became stockholder, but not employer, and Holly Farms continued as employer, Tyson would have no obligation to bargain because it had not yet succeeded Holly Farms. The Board has in the past subscribed to these statements of the law. For example, in *Hendricks-Miller Typographic Co.*, 240 N.L.R.B. 1082, 1083 n.4 (1979), the Board stated:

> The concept of "successorship" as considered by the United States Supreme Court in *N.L.R.B. v. Burns International Security Services, Inc., et al.*, 406 U.S. 272 (1972), and its progeny, contemplates the substitution of one employer for another, *where the*

> *predecessor employer either terminates its existence or otherwise ceases to have any relationship* to the ongoing operations of the successor employer.

(Emphasis added).[5]

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[5] The majority opinion has glossed over factual and legal distinctions between (1) the situation where a corporation continues in business, after its stock changes hands, without any change in its relationship with employees, and (2) the situation where a corporation moves through corporate and factual changes so that in effect a new employer *substitutes* for that of the former and exercises the "employer's authority" of the former. In the first situation, the *employing* corporation continues to have an obligation to bargain with its employees, notwithstanding the change in stock ownership which is irrelevant, and the stockholder does not become a substitute employer. In the second situation, successor liability imposes a duty to bargain on the successor employer. The majority collapses this distinction into an inquiry into a nebulous subscription to labor policy, stating:

> Whatever terms we use—whether we call Tyson a "successor," or a "new stockowner," or a "joint employer"—substantial evidence and the policies of the labor laws support the Board's finding here that Tyson came under a duty to bargain with the Union when it purchased Holly Farms.

Slip op. at 8. Such an approach is clearly foreclosed by *Burns*, *Esmark*, and *Hendricks-Miller*.

Under the stipulated facts here, the truck drivers in Holly Farms' transportation operations remained employed with Holly Farms for two months after Tyson's stock purchase. Their responsibilities and conditions of employment remained unchanged for those two months. When two separate corporate entities continue in separate form, as they did here, we must conclude that there was no succession for purposes of the successorship doctrine. *See Esmark*, 887 F.2d at 751.

In *EPE, Inc. v. NLRB*, 845 F.2d 483 (4th Cir. 1988), we examined a case strikingly similar to this in which one company, Echlin, purchased 100% of the stock of EPE, Inc. Other than the change of ownership from the

stock sale, however, there were no changes in the organization or operations of EPE's Fredericksburg plant. In that case, we declined to find successorship and held that EPE was a "continuing employer" still liable under its collective bargaining agreement. We emphasized that:

> There was no termination of operations or employees at the Fredericksburg plant. . . . Simply put, the Fredericksburg workers both went to work on the morning of Tuesday, October 22, and returned home later that afternoon as EPE employees. During that same time there occurred *not a substitution of one employer for another, but a change in the ownership of a continuing employer.*
>
> * * *
>
> EPE was a continuing employer. Operations at the plant were essentially unaffected by the stock transfer.

Id. at 488. We held that EPE was a "continuing employer" after the stock sale and that there was no successor employer of the Fredericksburg workers after the sale.

The situation at Holly Farms for the two months after the July 18 stock sale was no different from that at EPE after it sold its stock. There was no succession of Tyson as a new employer; rather, there was only "a change in the ownership of a continuing employer." *Id.* While I acknowledge that our holding in *EPE* "is a narrow one," I fail to see any fact that distinguishes the employment relationships at Holly Farms for the two months after July 18 from the situation we examined in *EPE*.

The majority opinion concludes, erroneously I believe, that when Tyson purchased the stock of Holly Farms on July 18, it became a successor to Holly Farms because *Holly Farms continued as a corporate entity* without any significant changes in its operations. Indeed, the majority acknowledges:

> For two months after the purchase, Tyson made no significant changes in Holly Farms' operations. Holly Farms—under Tyson's ownership—continued to engage in the same business operations at the same locations, selling the same products to the same customers, and it retained all of its employees under the same supervision and the same wages, hours, and working conditions.
>
> Those facts establish substantial continuity between Holly Farms and Tyson.

Slip op. at 9-10. The problem with the majority's opinion is that it failed to recognize that the termination of the previous employment relationship must be established and that a determination of this requirement should "precede[] the inquiry into the 'substantial continuity' that must be shown for a new employer to be found a successor." *EPE*, 845 F.2d at 489. I agree with the factual observations made by the majority opinion, but its conclusion that these facts give rise to successor liability is simply a misinterpretation of the law. For the two months during which Holly Farms' operations continued unchanged, but with a different stockholder, both Tyson Foods, Inc. and Holly Farms Corporation remained

separate corporations, and Tyson's ownership was simply a stock ownership position. By continuing in existence, Holly Farms retained its obligations to negotiate and bargain with exclusive representatives of the unit duly elected. Holly Farms also retained its obligations to adhere to the specific terms of the collective bargaining agreement already in place with its employees. In sum, the employees' relationship with Holly Farms remained the same, and in those circumstances it is well-established that the successor liability doctrine does not apply. *See Esmark*, 887 F.2d at 751; *Hendricks-Miller*, 240 N.L.R.B. at 1083 n.4.

Without any obligation to bargain during the two months following its

acquisition of Holly Farms' stock, Tyson could not have violated the labor laws for refusing to bargain. The Board's order imposing such a duty thus constitutes error.

In mid-September 1989, Tyson determined, for sound business reasons, to end Holly Farms' transportation operations. While the Board acknowledged that the decision was a legitimate business decision, I note further that Tyson's decision was economically compelling. Before Tyson's acquisition of Holly Farms' stock, Holly Farms transported its poultry products to its customers through its own transportation operation. It often dispatched drivers and trucks to customers with no load available for the return trip because the cus-

tomer network was not so vast as to supply that need. While Holly Farms made an express effort to lower its transportation costs by securing additional back-haul business, its efforts were largely unsuccessful. Indeed, the evidence shows that 50% of Holly Farms return miles were "dead head," where the trucks returned empty, resulting in an estimated annual loss to Holly Farms of approximately $5 to $6 million.

In contrast, Tyson's transportation operations were organized substantially differently, and they were profitable. Tyson hauled only 35% of its products through its own transportation system, making only those deliveries where back-haul business would routinely be available. Be-

cause it delivered only 35% of its products through its own operations, the remaining transportation needs were filled through common carriers. Thus, in contrast to Holly Farms' 50% ratio, Tyson's dead-head ratio was in the range of 7-1/2% to 12%.

In order to eliminate the large losses resulting from Holly Farms' transportation operations, Tyson decided to disband Holly Farms' operations and restructure its own to serve the combined customer base in the manner that Tyson had profitably established for its own customers. Tyson implemented this decision on September 22, 1989, at which time Holly Farms' drivers were terminated, but with an offer to work in Tyson's

operation, subject to Tyson's more efficient methods.

When Tyson disbanded Holly Farms' transportation operations and merged those drivers into its own fleet, Tyson became a substitute employer. At that time, the successorship principles of *Burns* might have required Tyson to bargain with the union if Tyson had continued with the same employees under a similar structure. But Tyson would only have a duty to recognize a preexisting bargaining unit if Tyson's structure and practices mirrored those of Holly Farms. *See Burns*, 406 U.S. at 280. In such circumstances, Tyson would be required to bargain with the union, but Tyson would not be required to accept the terms and agreements of Holly

Farms' collective bargaining agreement with the union because "a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor." *Burns*, 406 U.S. at 294.

In this case, when Tyson terminated the Holly Farms transportation operation and hired its truck drivers, the new operational structure and practices differed substantially from those of Holly Farms. Thus, the inherited bargaining unit was no longer an appropriate one. Moreover, the drivers assimilated from Holly Farms only constituted a portion of Tyson's long-haul trucker group. In those circumstances, the Holly Farms bargaining unit did not remain intact and would not be the appropriate unit

with which Tyson was required to bargain.

Deriving unfair labor practices from these circumstances would imply that Tyson, as an acquiring and thereafter successor corporation, must carry the burden of an inefficient structure and inappropriate bargaining unit previously established by Holly Farms. The jurisprudence of *Burns*, and the circuit court decisions interpreting it, do not require this result. *See, e.g., NLRB v. Security-Columbian Banknote Co.*, 541 F.2d 135, 139-40 (3d Cir. 1976). Therefore, I would deny enforcement of the Board's order as it relates to Tyson's conduct in acquiring and restructuring Holly Farms.

For these reasons, I dissent.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS
BOARD - DIVISION OF JUDGES

HOLLY FARMS CORPORATION
AND ITS SUCCESSOR,
TYSON FOODS, INC.

and Cases 11-CA-13184
11-CA-13267
11-CA-13487

CHAUFFEURS, TEAMSTERS
AND HELPERS LOCAL UNIONS
NOS. 29, 71, 355, 391, 592,
567 and 988, AFFILIATED WITH
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WARE-
HOUSEMEN AND HELPERS OF
AMERICA, AFL-CIO

HOLLY FARMS CORPORATION AND
ITS SUCCESSOR, TYSON FOODS,
INC.

Employers

and Case 11-RC-5583

CHAUFFEURS, TEAMSTERS AND
HELPERS LOCAL UNION NO. 391,
AFFILIATED WITH INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA, AFL-CIO
HELPERS OF AMERICA, AFL-CIO

Petitioner

Jasper C. Brown, Jr., and Michael W. Jeannette, Esqs., of Winston-Salem, NC, for the General Counsel.
Jesse S. Hogg and James M. Blue, Esqs. (Hogg, Allen, Norton & Blue, P.A.), of Coral Gables and Tampa, FL, and William C. Warden, Jr., Esq. (McElwee, Cannon & Warden), of North Wilkesboro, NC for the Respondents.
J. David James and Bryan Lessley, Esq. (Smith, Patterson, Follin, Curtis, James Harkavy & Lawrence), of Greensboro, NC, for the Charging Parties.
3487

By Chairman Stephens and Members Devaney and Oviatt

On March 12, 1992, Administrative Law Judge Robert M. Schwartzbart issued the attached decision. The Respondents filed exceptions and a supporting brief.[6]

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[6] The Respondents filed a motion to reopen the record to admit evidence material to the question of alleged majority status in the live haul unit and to the effect of delay on the judge's recommended bargaining order in that unit. The General Counsel filed a motion in opposition to the Respondents' motion, and the Respondents filed a memorandum in opposition to the General Counsel's position. After reviewing the parties' submis-
(continued...)

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief[7] and has decided to affirm the judge's rulings, findings,[8] and conclusions except as

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[6](...continued)
sions, we deny the Respondents' motion for reasons that will be explained more fully below.

[7] We have accepted the parties' post-hearing stipulation for submission of the Holly Farms Retirement Plan as a joint exhibit. However, we have not considered the evidence submitted with the Respondents' exceptions and brief, which is outside the record.

[8] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility findings unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We correct certain errors made by the judge. Regarding the judge's Statement of the Case, we note initially that Local 29 has

(continued...)

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[8](...continued)
geographic jurisdiction over the unit facilities in Harrisonburg, not Harrisburg, Virginia. Local 71 has geographic jurisdiction over the unit facilities in Monroe, North Carolina, not Virginia. Additionally, the correct unit description for the drivers and yardmen unit as set forth in the certification of representative is as follows:

> All driver employees and yardmen at the Employer's Monroe and Wilkesboro, North Carolina; Glen Allen, Harrisonburg, and Temperanceville, Virginia; and Center and Seguin, Texas facilities; excluding all office clerical employees, and guards and supervisors as defined in the Act.

In sec. III.B,2, par. 1, the judge stated that Sloop was promoted on June 25, rather than September 25, 1989. In sec. III.C.1(d), par. 2, the judge attributed the "scapegoat" statement to Absher, rather than to Branscome. In sec. III.C.2(c), par. 9, we do not rely on the judge's statement that employees were arrested for handbilling during the same week that Lankford gave his speech. In sec. III.C.2(f), par. 3, regarding the judge's reference to the coercive interrogation of employee Church we note that the judge had previously found that the interrogation of Church was not unlawful because Church was an open and active union supporter. In sec. III.C.3(b)(i), par. 5, we note that the effective date for the pay raise for hourly employees that was announced on June 16, 1989, was July 2, 1989. In sec. III.D.2(b), the last word in par. 12 should be west, not east.

We also correct the following case citations: *Rossmore House*, 269 NLRB 1176 (1984); *SMCO, Inc.*, 285 NLRB 1291 (1987); *J. P. Stevens & Co.*, 247 NLRB 420 (1980); and *Quality Aluminum Products*, 278 NLRB 338

(continued...)

[8](...continued)
(1986).

Regarding the judge's findings of violations of Sec. 8(a)(1) affecting the drivers and yardmen unit, in adopting the judge's finding that Dispatcher Absher's statement to employee Branscome regarding the increased use of outside carriers was coercive, we do not rely on his characterization of the relevance of the fact that Absher and Branscome were friends. Cf. *Pittsburgh & New England Trucking*, 238 NLRB 1706, 1707 (1978), enfd. in part mem. 612 F.2d 1309 (4th Cir. 1979) (solicitations made by a friend who was part of management had greater impact in view of the authenticity and credibility of the source).

Additionally, we find it unnecessary to pass on the judge's finding that Supervisory Murphy's statement to employee Layman that he hoped he did not find out who had sent a union card and that he probably knew constituted an unlawful threat of reprisal, because any such finding would be cumulative and would not affect the Order. For the same reason, we find it unnecessary to pass on the judge's finding that the speech given by Holly Farms President Blake Lovette on February 18, 1989, unlawfully threatened employees with job loss. We further note that no exceptions were filed to the judge's finding that Lovette's January 1989 speech was not unlawful.

With respect to the live haul unit, contrary to Member Oviatt's position in his partial dissent, Chairman Stephens and Member Devaney rely on the Board's prior determination in the representation case that the live haul workers are statutory employees.

Regarding the judge's findings of violation of Sec. 8(a)(1) affecting the live haul unit, we find it unnecessary to pass on the judge's finding that the statement made by Live Haul Manager Ray Lovette to employee

(continued...)

modified below, and to adopt the recommended Order as modified and set forth in full.[9]

1. The judge found that the Respondents violated Section 8(a)(1) by discriminatorily excluding prounion literature from the live haul bulletin boards prior to the election in the live haul unit. The judge credited the testimony of Dimmette, a live haul driver, who testified that employees were allowed to post no-

[8](...continued)
Sturgill regarding Sturgill's union cap was coercive, because any such finding would be cumulative. Similarly, we find it unnecessary to pass on the judge's finding that the speech given on March 29, 1989 by Holly Farms Vice President of Human Resources Lankford constituted an unlawful threat of job loss. We note that no exceptions were filed to the judge's finding that Lankford's April 12, 1989 speech was not unlawful.

[9] We have modified the judge's Conclusions of Law, recommended remedy, recommended Order, and notice to conform to the violations found.

tices on the boards. Dimmette testified that on several occasions he posted union notices which, unlike other announcements, never remained on the boards for more than a day. Although Dimmette admitted that he never saw anyone take down the notices, the judge found that "the burden passed to the Respondents, who controlled the bulletin boards to enter a denial or an explanation, which they did not do." The Respondents contend that the judge erred in finding a violation because there is no evidence that employer representatives were responsible for the removal of the literature. We find merit in the Respondents' contention.

An employer violated the Act by discriminatorily prohibiting the

posting of union notices on bulletin boards that are available for general use by employees. *Central Vermont Hospital*, 288 NLRB 514 fn. 2 (1988). Here, the employees had direct access to the bulletin boards and posted notices themselves. Contrary to the judge's finding, the record does not establish that the Respondents controlled the bulletin boards. There is no evidence that the Respondents knew about the union notices, removed them, or authorized their removal.[10] Under the circumstances, we reverse the judge and find that the Respon-

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[10] In this respect, the case before us is distinguishable from *Marathon Letourneau Co.*, 256 NLRB 350, 357-358 (1981) enfd. 699 F.2d 248 (5th Cir. 1983), cited by the judge, in which there was direct evidence that the union literature was discriminatorily removed by a statutory supervisor.

dents did not unlawfully remove union literature from the bulletin boards.

2. The judge found, and we agree, that the Respondents violated the Act by granting the live haul unit employees a wage increase on July 2, 1989,[1] shortly before the scheduled election on July 27. Although we agree with the judge's conclusion and with his analysis of the relevant facts, we do not rely on any presumption that increases granted during a union organizing campaign are unlawful. Rather, we draw an inference of improper motivation and interference with employee free choice from all the evidence presented and from the Respondents' failure to establish a

[1] All dates are in 1989 unless otherwise indicated.

legitimate reason for the timing of the increase. See *B & D Plastics*, 302 NLRB 245 (1991); *Speco Corp.*, 298 NLRB 439 fn. 2 (1990).

In terms of timing, the Respondents maintain that the wage increase was not unlawful because both the decision to grant the increase and its announcement on June 16 were made after the Board had dismissed the representation petition in the live haul unit and before the Board on June 20 reordered an election. However, regardless of when the Respondents knew that an election would be held, the salient fact is that the wage increase was both announced and made effective *after* the representation petition was reinstated on April 28. Thus, the wage increase

was plainly granted during the union organizing campaign.

The Respondents also contend that the increase was given for legitimate business reasons, as explained in its June 16 letter to employees.[12] We find, however, that even if business at Holly Farms had improved during the spring of 1989, the Respondents have not established a legitimate reason for the timing of the increase. As found by the judge, not only was the wage increase unscheduled, but it was contrary to Respon-

[12] The letter stated in pertinent part:

> This wage increase would not have been implemented until January 1, 1990. However, our markets have been substantially better than planned. Even more importantly, together we have improved efficiency company-wide, thus enabling Holly Farms to implement the wage increase six months ahead of time.

dent Holly Farms' stated policy, set forth in its December 16, 1988 letter to employees, that wage rates would not be raised for 1989. In addition to being against stated policy, the wage increase addressed a primary concern of the live haul employees, who informed Live Haul Manager Ray Lovette in April that the pay from their short 4-day workweek was inadequate. Finally, as emphasized by the judge, the size, timing, and applicability of the increase proceeded entirely at the Respondents' discretion.

The Respondents also contend that the fact that the increase was given to all 11,000 Holly Farms employees who were not represented by bargaining units indicates the lack of an

intent to coerce or discriminate against the 201 members of the live haul unit. Although we recognize that the unit employees comprised only a small percentage of the total number of employees receiving the increase, this factor does not persuade us, under the totality of the circumstances here, that the wage increase was not unlawful. In addition to the factors discussed above, we note that at the time the wage increase was given, Holly Farms' production employees were in the midst of union organizing activities.[13] Thus, the wage increase might have been reasonably calculated to discourage union

[13] There were about 2000 production workers at Wilkesboro. As of the time of the hearing, no labor organization had filed a petition seeking to represent the production employees.

activity throughout Holly Farms. See *St. Francis Federation of Nurses v. NLRB*, 729 F.2d 844, 852 (D.C. Cir. 1984), enfg. 263 NLRB 834 (1982). In this regard, the judge found numerous instances of unlawful conduct designed to undermine the Unions' organizing efforts. See *Q-1 Motor Express*, 308 NLRB No. 185, JD slip op. at 16 (Sept. 30, 1992).

Finally, we reject the Respondents' contention that the speech given to the unit employees by Vice President of Human Resources Lankford shortly after the Board ordered the election negated any coercive effect of the wage increase under the standards set forth in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). In his speech, Lankford did not admit

to any wrongdoing, as required under *Passavant*. Rather, he sought to justify the increase on economic grounds and to put to rest "the rumor" that the increase was given because of the election. Additionally, the speech did not occur in an atmosphere free of other unfair labor practices. See *Farm Fresh, Inc.*, 305 NLRB No. 132 fn. 1 (Dec. 19, 1991). For all these reasons, we agree with the judge that the wage increase given to live haul employees was unlawful.

3. The bargaining issues presented concern the relationship between Respondents Holly Farms and Tyson, and their respective bargaining obligations with respect to changes that were made in the transportation division of Holly Farms after its pur-

chase by Tyson. The facts are set forth in full in the judge's decision. In brief, the relevant facts are as follows:

The Unions and Respondent Holly Farms engaged in good-faith bargaining with respect to employees in the drivers and yardmen unit beginning on March 24. The Respondents' attorney, Hogg, was chief spokesperson for the Company, and Blevins, who was secretary-treasurer of Teamsters Local 391, filled that role for the Unions.

The parties stipulated that on July 18, Tyson Foods purchased a controlling interest in the stock of Holly Farms Corporation. They further stipulated that Holly Farms since that date has been engaged in the same business operations at the

same locations selling the same products to substantially the same customers, and that a majority of the employees were previously employees of Holly Farms. Holly Farms is described in the stipulation as being wholly owned by Tyson Foods.

The judge found that the parties agreed to suspend negotiations during July in order to gain time to clarify Holly Farms' status and bargaining position following the purchase. Negotiations resumed on August 8. At the outset of the meeting, Hogg informed the Unions' negotiators that Tyson representatives were present for informational purposes and were prepared to answer questions about the changes that Tyson planned to implement. More specifically, Hogg

stated that Tyson wanted to integrate the western divisions of Holly Farms transportation department[14] with the Tyson transportation system, which would entail some layoffs of drivers. According to Hogg, the eastern division of Holly Farms transportation department[15] would continue to operate under the Holly Farms name, but with a reduced number of drivers and tractors. Union Representative Blevins objected to any reduction in the number of drivers in the east. The parties continued to negotiate contract terms.

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[14] The western division consisted of the facilities in Texas.

[15] The eastern division consisted of the facilities in Virginia and North Carolina.

The parties met on several other occasions in August.[16] At the September 12 negotiating session, Hogg announced that the Respondents had revised their plan and were going to integrate both the eastern and western divisions of Holly Farms transportation department with the Tyson transportation system. The decision was attributed to the discovery of more backhaul freight than was previously thought to be available. Hogg stated it would no longer be necessary to lay off Holly Farms drivers, who, for all intents and purposes, would become Tyson drivers and would

[16] At these meetings, Hogg stated that drivers would not be laid off in the west. Blevins continued to object to any reduction in the driver force in the east, and asked the Respondents to reconsider their decision to remove the Holly Farms drivers in Texas from the bargaining unit.

be paid under the Tyson payscale, but would continue to receive Holly Farms fringe benefits as provided for in the merger agreement between Holly Farms and Tyson. Hogg further informed the Unions that the Holly Farms transportation division would no longer exist upon being integrated into the larger Tyson transportation system, and that the Unions would no longer have majority support in the combined group. Regarding the Respondents' bargaining obligations, Hogg repeated several times Respondent Holly Farms' willingness to bargain about the impact of the integration decision but not about the decision itself, but refused Blevins' request to provide the Unions with a copy of the merger agreement.

Blevins asserted that impact bargaining was not appropriate, and further stated that, in any event, the Unions did not have certain requested information that was necessary for bargaining.

Also on September 12, Respondent Holly Farms sent its drivers a letter stating that Tyson had assumed all long-distance transportation functions. The letter further stated that Holly Farms drivers were being offered employment as Tyson drivers under the Tyson pay plan, but with Holly Farms benefits to be continued as described in the merger agreement. The letter concluded, "Please contact John Sloop on or before *September 22, 1989*, for your processing to become a

Tyson Foods employee." (Emphasis in original.)

The parties continued to exchange correspondence in September and October. In these letters, the Unions requested certain information, including the merger agreement, and demanded bargaining about both the integration decision and the impact of that decision. The Respondents asserted that Holly Farms was willing to bargain about the impact of the integration decision until such time as the integration process was complete, but contended that Tyson had no bargaining obligation because the bargaining unit no longer existed. A copy of the section of the merger agreement relating to employee benefit plans was eventually provided to

the Unions, but the Respondents continued to deny the relevance of the agreement in its entirety.

Relying on the parties' stipulation of fact, set forth above, regarding Tyson's purchase of Holly Farms, the judge found that for 2 months following the purchase nothing changed for the former Holly Farms employees, all of whom were retained on the payroll under their existing wages, hours, and terms and conditions of employment. The judge therefore found that as of July 18, Tyson became Holly Farms' successor and employed a substantial and representative complement of employees. The judge further found that because Respondent Tyson did not exercise its right as a successor to set initial

terms and conditions of employment for the former Holly Farms employees whom it retained, those terms became established and not subject to unilateral change. In so finding, the judge rejected the Respondents' contention, raised as a defense to the successorship allegation, that as of September 22, the Holly Farms drivers and yardmen unit was accreted into the Tyson transportation system and was no longer an appropriate unit. Rather, the judge found that in both the eastern and western divisions, the former Holly Farms drivers continued to be separately identifiable from the Tyson drivers. Based on his findings of successorship and no accretion, the judge found that the Respondents violated Section 8(a)(5)

and (1) by refusing to bargain with the Unions about the August 8 decision, which was later rescinded, to partially integrate the Holly Farms transportation system with the Tyson system, and about the full functional integration decision announced on September 12. The judge further found that the unilateral changes in terms and conditions of employment caused by the integration, including the September 12 job offer to Holly Farms drivers, violated Section 8(a)(5) and (1) and also constituted constructive discharges of the 47 Holly Farms drivers who did not accept employment with Tyson. Finding that the Respondents' conduct on September 12 constituted a withdrawal of recognition from the Unions, the

judge rejected the Respondents' contention that the integration of the former Holly Farms drivers into the larger Tyson transportation system constituted an "unusual circumstance" that justified the withdrawal of recognition during the certification year.[17]

In rejecting this defense, the judge relied on his findings that the unilateral changes resulting from the integration, and the integration process itself, were unlawful refusals to bargain. Included among those unilateral changes he found unlawful was the change in the Holly Farms pension plan, which was to be continued in effect for only 2 years fol-

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[17] See *Brooks v. NLRB*, 348 U.S. 96 (1954).

lowing the integration. Finally, the judge found that the Respondents violated Section 8(a)(5) and (1) by refusing to provide the Unions with a copy of the merger agreement, which he found to be "the most authoritative and reliable source" concerning the continuation of Holly Farms job benefits for those drivers who accepted employment with Tyson.

The Respondents contend that the judge erred in applying successorship principles to the July 18 purchase, which they characterize as a stock transfer which preserved the status of Holly Farms as the employing entity of unit employees.[18] Based on this theory, the Respondents contend

[18] See *Phil Wall & Sons Distributing*, 287 NLRB 1161 (1988).

that only Holly Farms, but not Tyson, had and recognized a continuing obligation to bargain with the Unions immediately following July 18. Successorship principles first became applicable, according to the Respondents, when Tyson made the decision to integrate the Holly Farms and Tyson transportation systems, thereby effecting the substitution of one employer for another that characterizes a successor transaction. Citing *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), the Respondents contend that the decision to integrate operations was motivated by sound business judgment, and was not a mandatory subject of bargaining. More specifically, the Respondents maintain that on September 22,

Tyson lawfully established the initial terms and conditions under which it would employ the former Holly Farms drivers, and that it reached a representative complement on September 22, the date by which the employees had to respond to the offer of employment. The Respondents assert, however, that Tyson did not succeed to Holly Farms' bargaining obligation and that the withdrawal of recognition was appropriate because, applying the principles of both accretion and functional integration analyses,[19] the former Holly Farms unit employees became an indistinguishable segment of the Tyson transportation

[19] See, respectively, *Border Steel Rolling Mills*, 204 NLRB 814, 821 (1973), and *Kelly Business Furniture*, 288 NLRB 474, 475 (1988).

work force, and the certified unit was no longer appropriate. Regarding the Unions' request for a copy of the merger agreement, the Respondents contend that although Holly Farms had an obligation to bargain about the effects of the integration decision, the Unions requested this document in connection with their demand for decision bargaining, and did not demonstrate its relevance as to effects bargaining. Finally, the Respondents contend that the terms of the Holly Farms Retirement Plan provided the Employer with the right to discontinue the plan, and therefore that its termination was not an unlawful unilateral change.

The Board has addressed the distinction between a "successorship,"

which contemplates the substitution of one employer for another, and a "stock transfer," which involves the continuing existence of a legal entity, but under new ownership. *Hendricks-Miller Typographic Co.*, 240 NLRB 1082, 1083 fn. 4 (1979). The effect of a change in ownership on labor obligations is, however, a matter to be considered on the specific facts of a particular case. *EPE, Inc. v. NLRB*, 845 F.2d 483, 490 (4th Cir. 1988), enfg. in pertinent part 284 NLRB 191 (1987). Recognizing that a stock sale could serve as a vehicle for the acquisition of resources that will be used to operate a substantially different enterprise from that conducted by the original owners, the court in *EPE* posited:

> Where the corporate form survives only in name, but an entirely new operation replaces the old, the corporation might not be fairly termed a "continuing" employer in any practical sense. Should substantial changes in an operation indicate that its sale was not a "mere substitution of one owner for another through a stock transfer within the context of an ongoing enterprise," the obligations of the employer may be governed by successorship principles rather than by continued enforcement of an agreement. [845 F.2d at 490 (citation omitted).][20]

We agree with the judge's finding that Respondent Tyson became a suc-

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[20] For example, the Board has applied a successorship analysis to determine the bargaining obligation of a corporation that continued to exist, but as an integrated subsidiary of the larger purchasing corporation and with some alteration of its business operation. See *Spencer Foods*, 268 NLRB 1483 (1984), enf. granted in part sub nom. *Food & Commercial Workers Local 152 v. NLRB*, 768 F.2d 1463, 1471 (D.C. Cir. 1985). We note that both the Board and the court in *Spencer Foods* applied successorship principles, but disagreed as to whether there was substantial continuity of operations.

cessor of Holly Farms when it purchased a controlling interest in the corporation on July 18, and that its bargaining obligation arose on that date because it employed a substantial and representative complement of unit employees. Tyson's purchase of Holly Farms stock involved at the outset a broader form of reorganization than a mere stock transfer.

Although Holly Farms continued to exist as a corporate entity, the following factors indicate that at the time of the July 18 stock purchase, Tyson began to implement steps that would result in its substitution as the employing entity of the unit employees. We note that Tyson's initial bid for Holly Farms was made in October 1988, and as early as January

1989, Tyson officials began formulating tentative plans for integrating the Holly Farms and Tyson transportation divisions. As detailed by the judge, "upon Tyson's assumption of control, key Holly Farms executives almost immediately were absorbed into the Tyson organization," and performed their duties as part of the Tyson management team and in accordance with Tyson's dictates. Additionally, at the time of the stock purchase, negotiations between the Unions and Holly Farms were suspended to enable Respondent Holly Farms to clarify its status and bargaining position. To that end, on July 14 and 15, management representatives from Holly Farms and Tyson met to discuss the status of the collective-

bargaining negotiations, and also Tyson's corporate goals, which became the basis for the subsequent integration plans. The judge found that Holly Farms President Lovette consulted with Tyson officials before instructing the Respondents' attorney, Hogg, on how to present information about integration to the Unions. When collective-bargaining negotiations resumed on August 8, Tyson officials were present to answer questions about the operational changes that Tyson planned to implement. We find, contrary to the Respondents' contention, that Tyson's involvement in the operation of the Holly Farms transportation division as of the time of its acquisition warrants the

application of successorship principles as of that date.

Regarding the September 12 offer of employment to the former Holly Farms drivers, having adopted the judge's successorship findings, we also adopt his finding that Respondent Tyson did not exercise its right at the time it purchased Holly Farms to set initial terms and conditions of employment for the former Holly Farms employees and, therefore, that it could not unilaterally change those terms on September 12. Further, as discussed below, although we agree with the Respondents that the decision to functionally integrate the Holly Farms and Tyson transportation departments was not a mandatory subject of bargaining, we disagree

with their related contention that Respondent Tyson therefore lawfully commenced integration when it offered the Holly Farms drivers employment as Tyson employees without first bargaining with the Unions.

The Supreme Court in *First National Maintenance Corp. v. NLRB*, above, set forth principles for determining whether a given management decision is a mandatory subject of bargaining. Applying those principles here, we find that the Respondents' decision to integrate the transportation division of Holly Farms with the Tyson transportation system falls within the third category of management decisions identified by the Court, those which have a direct impact on employment but have as their focus

only the economic profitability of the business. Such decisions, according to the Court, involve a change in the scope and direction of the business and are akin to the decision whether to be in business at all. For these decisions, the Court held that bargaining would be required "only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business." 452 U.S. at 676-679.

The Respondents' testimony at the hearing established that the integration decision had as its focus a desire to improve the economic profitability of the former Holly Farms long-haul transportation division. As described by Charles Irwin, Tyson

group vice president of distribution and commodity purchasing, Tyson's transportation system, which was run like a common carrier, generated significant backhaul revenue[21] and was a profit center within the corporation. To achieve this result, Tyson hauled its own products only into areas where it had established backhaul customers, and relied on common carriers to transport its products to areas without backhaul loads, thereby minimizing its empty mileage ratio. According to Irwin, the Holly Farms transportation department, by contrast, existed primarily to transport Holly Farms' products to customers, had a substantial amount of empty

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[21] "Backhaul" refers to the delivery of products for other companies as part of the return trip to the Tyson facilities.

mileage on the backhaul portion of its business, and was losing money. Irwin testified that Tyson hoped, through integration of the transportation departments and application of the Tyson corporate philosophy and policies, to decrease Holly Farms' empty mileage ratio and increase its backhaul revenues with an eye toward earning a profit. Based on Irwin's uncontroverted testimony, we find that the planned functional integration had as its focus the economic profitability of Holly Farms' transportation division, and involved a change in the scope and direction of the division. See *First National Maintenance*, above.

Having found that the integration decision was economically motivated,

we next apply the balancing test described in *First National Maintenance* to determine whether the Respondents had an obligation to bargain about the decision. There is no indication that the decision here was motivated by a desire to reduce labor costs, a matter which the Court has found to be "peculiarly suitable for resolution within the collective bargaining framework."[22] Moreover, requiring bargaining over the integration decision would place a significant burden on the Respondents because, as explained by Irwin, the integration process involved structural and operational changes designed to make the

[22] See the Court's discussion in *First National Maintenance*, *id.* at 680, of the application of a balancing test in *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 213-214 (1964).

former Holly Farms transportation division operate like a common carrier.[23] Additionally, implementation of the integration decision required the expenditure of capital.[24] For these reasons, we find that the burden on the conduct of the business outweighs any benefit that might be gained from the Unions' participation in the decision and, therefore, that the September 12 integration decision was not a mandatory subject of bargaining. Accordingly, we reverse the judge's finding that the Respondents violated Section 8(a)(5) and (1) by

[23] For example, the former Holly Farms drivers, who had previously followed established routes, began to make multiple-leg trips in order to generate backhaul revenue.

[24] New central terminals, for example, were built in the eastern and western division of the former Holly Farms transportation department.

failing to bargain about the integration decision.

The Board has recognized, however, that employers may be obligated to bargain over the effects on unit employees of management decisions that are not themselves subject to the obligation to bargain. *Litton Business Systems*, 286 NLRB 817, 819-821 (1987), enfd. in pertinent part 893 F.2d 1128 (9th Cir. 1990) (citing *First National Maintenance*, above).[25] Here, we find that the Respondents had an obligation to bargain over the decision to offer Holly Farms drivers

[25] In *Litton*, the Board found that an *employer's* decision to lay off employees was bargainable as an effect of a decision to transfer certain work and convert operations. See also *Paramount Poultry*, 294 NLRB 867, 869-870 (1989) (decisions to reduce the workweek and to lay off employees bargainable as effects of the decision to terminate part of product line and customer base).

employment as Tyson employees under Tyson terms and conditions of employment as an effect of the integration decision. In so finding, we note that the terms at which the Holly Farms drivers were offered employment were not an inevitable consequence of the functional integration of the transportation departments, but were only "one of a number of responses to changed circumstances." *Litton*, 286 NLRB at 820. The Respondents were therefore required to give the Unions notice and an opportunity to bargain about the various ways in which the integration might affect the employment status and wages and benefits of the former Holly Farms drivers.

An examination of the correspondence exchanged between the Unions

and the Respondents in September and October makes clear that the Unions repeatedly requested bargaining about both the integration decision and its effects, and requested certain information, including the merger agreement, which they contended was necessary for effective bargaining. The Respondents maintained throughout that Tyson had no bargaining obligation with respect to the Unions because the bargaining unit was no longer appropriate. Respondent Holly Farms indicated a willingness to bargain about the "impact" of the integration decision until such time as integration was complete, but asserted the Respondents' right to make the September 12 unilateral changes in terms and conditions of employment

as part of the integration decision and indicated that those changes would not be rescinded.

The Respondents also refused to provide the requested information, contending that the Unions did not demonstrate its relevance to effects bargaining.[26] Under the circumstances, including our finding that Respondent Tyson was obligated to bargain as a successor employer as of July 18, we find that the Respondents violated Section 8(a)(5) and (1) by refusing to bargain about the September 12 offer of employment to the Holly Farms unit employees as an ef-

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[26] We agree with the judge, for the reasons stated in his decision, that the Respondents violated Sec. 8(a)(5) and (1) by refusing to provide the Unions with a complete copy of the merger agreement between Holly Farms and Tyson.

fect of the integration decision. We further find that the Respondents unlawfully conditioned employment on the acceptance of Tyson terms and conditions of employment, thereby discharging 47 employees in violation of Section 8(a)(5) and (1). See *Tuskegee Area Transportation System*, 308 NLRB No. 47, slip op. at 4-5 (Aug. 14, 1992).[27]

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[27] In finding that the Respondents unlawfully conditioned employment, Members Devaney and Oviatt do not adopt the judge's finding that the 47 employees were constructively discharged. See *Crystal Princeton Refining Co.*, 222 NLRB 1068, 1069 (1976).

Chairman Stephens, unlike his colleagues, agrees with the judge that the employees were constructively discharged. He does not rely, however, on those constructive discharge cases cited by the judge (exemplified by *Mfg. Services*, 295 NLRB 254 (1989)), in which the theory is that an employer intentionally sought, out of discriminatory motives, to rid it-

(continued...)

We have found that Respondent Tyson became a successor of Respondent Holly Farms on July 18, and that the

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[27](...continued)
self of an employee through the imposition of working conditions so difficult or unpleasant as to induce the employee to quit. Id. at 255 and cases there cited. Instead, Chairman Stephens relies on another line of cases finding constructive discharges on the ground that the employees in question quit because the employer had presented them with a choice between quitting or remaining employed under terms and conditions of employment established in derogation of their statutory rights. See e.g., *Control Services*, 303 NLRB 481, 485 (1991), enfd. mem. 975 F.2d 1551 (3d Cir. 1992); *White-Evans Service Co.*, 285 NLRB 81, 81-82 (1987).

We adopt the judge's finding that the Respondents also violated Sec. 8(a)(5) and (1) by dealing directly with unit employees concerning terms and conditions of employment. We find it unnecessary, however, to pass on the Respondents' bargaining obligations with respect to the August 8 partial integration decision, which was rescinded shortly thereafter. We note that, in any event, there were no bargainable effects of this decision, which was never implemented.

Respondents had an obligation to bargain about the September 12 offer of employment to the Holly Farms employees as effects of the integration decision. In so finding, we reject the Respondents' contention that Respondent Tyson had no obligation to bargain with the Unions because the unit employees were completely assimilated into the larger Tyson transportation work force, and the bargaining unit ceased to be appropriate. We adopt the judge's conclusions that the bargaining unit did not lose its separate identity under either an accretion analysis, or under the Respondents' related contention that the functional integration of the transportation departments constituted an "unusual circumstance" that would

justify the withdrawal of recognition during the certification year, but we do so only for the following reasons.

First, the Board has found that in determining whether accretion is proper, unless there is a well-defined plan or timetable for achieving full functional integration of operations, the changed nature of the operation should be assessed at the time the withdrawal of recognition occurred. *Northland Hub, Inc.*, 304 NLRB No. 84, JD slip op. at 23-24 (Aug. 27, 1991). In this case, the judge found, and we agree, that the Respondents withdrew recognition on September 12 when they announced the plans for integration and stated that upon such integration the bargaining unit would cease to exist. Signifi-

cantly, Tyson Vice President Irwin admitted that, as of that date, there was no detailed plan for the integration of the transportation departments. When questioned as to what was actually done after the September 12 meeting with the Unions "by way of combining these operations," Irwin responded, "We drafted out a rough outline of what we would do to implement and some timeframes that we felt like that we could get this integration process put in place by." Under the circumstances here, where at the time of the withdrawal of recognition there was no integration of operations or even detailed plans for implementation of the integration, we find that the Respondents are not entitled to rely on Tyson's future

plans for the Holly Farms transportation department to justify refusing to bargain with the Unions. See also *Phil Wall & Sons Distributing*, above; *EPE, Inc.*, 284 NLRB 191, 199 fn. 9 (1987), enfd. in pertinent part 845 F.2d 483 (4th Cir. 1988).[28]

Second, as found by the judge, many of the factors relied on by the Respondents to support their contention that the bargaining unit no longer remained appropriate were un-

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[28] Concerning the Respondents' reliance on the integration of Holly Farms' and Tyson's operations, we note that such integration does not necessarily—and does not here—negate the separate identity of the drivers' and yardmen's unit. See *Bowie Hall Trucking*, 290 NLRB 41, 42 (1988) (companywide unit in trucking operation not the only appropriate unit even though wages and fringe benefits were both uniform and centrally determined and a single employee manual/driver handbook applied to all employees).

lawful unilateral changes.[29] See *Armco., Inc. v. NLRB*, 832 F.2d 357, 364 (6th Cir. 1987), enfg. in pertinent part 279 NLRB 1184 (1986). Finally, our finding that the Respondents' withdrawal of recognition from the Unions was not justified is further supported by the fact that the unlawful changes occurred during the certification year.

Although we have found that the Respondents were obligated to bargain with the Unions about the offer of employment to the Holly Farms employees under Tyson terms and conditions of employment as effects of the non-

[29] Specifically, the judge cited as examples the unilateral changes in pay, work locations, schedules, and other terms of employment resulting from the integration. We have found that the Respondents had an obligation to bargain over these subjects as effects of the integration decision.

mandatory integration decision, we find merit in the Respondents' contention that its announcement to employees that the Holly Farms Retirement Plan would be terminated 2 years after the Tyson acquisition was not unlawful.[30] Section 7.02 of the Holly Farms Retirement Plan, which we have accepted into evidence, provides in pertinent part, "Although it is expected that the Plan will be continued indefinitely, each Employer reserves the right to at any time terminate the Plan by action of its board of directors and to discontinue all contributions hereunder." In *St. Marys Foundry Co.*, 284 NLRB 221

[30] The judge found that the employees were notified of this change on September 12, and again in December correspondence and at a January 1990 meeting.

at 231 and 233 (1987), enfd. 860 F.2d 679 (6th Cir. 1988), the Board relied on a similar clause, by which the employer reserved the right of termination under the terms of the pension plan, to find that the successor employer's cessation of the plan did not violate the Act. We further note that here, there was no collective-bargaining agreement in effect between Respondent Holly Farms and the Unions that could restrict the Respondents' right to terminate the plan. Accordingly, we reverse the judge and find that the Respondents did not violate Section 8(a)(5) and (1) by unilaterally changing, with the intent of terminating in 2 years, the Holly Farms Retirement Plan.

4. The judge found that on March 31, Local 391 achieved majority status in the live haul unit. He further found that the Respondents' unfair labor practices justified a *Gissel*[31] bargaining order with respect to that unit. In so finding, the judge discussed the unfair labor practices committed by the Respondents against the live haul employees. Citing *J. P. Stevens, Inc.*, 239 NLRB 738, 770 (1978), modified 623 F.2d 322 (4th Cir. 1980), he also relied on the Respondents' unlawful conduct directed toward nonunit employees, including drivers and production employees, to justify imposing a bargaining order in the live

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[31] ***NLRB v. Gissel Packing Co.***, 395 U.S. 575 (1969).

haul unit. The Respondents dispute the judge's finding of majority status; they contend that even if Local 391 achieved majority status, a bargaining order is not warranted here; and maintain that the judge's reliance on unfair labor practices affecting nonunit employees was misplaced. We adopt the judge's imposition of a bargaining order, but with the following modifications.[32]

A showing of majority status is a prerequisite to the imposition of a *Gissel* bargaining order. *Philips Industries*, 295 NLRB 717, 718 fn. 10 (1989). In support of their position

[32] The election was held in the live haul unit on July 27. We adopt the judge's recommendation that the election should be set aside because Respondent Holly Farms engaged in unlawful conduct that was alleged to be objectionable and that interfered with free choice in the election process.

that the Union did not achieve majority status, the Respondents contend that 6 of the 103 authorization cards submitted by the General Counsel should not be counted because of deficiencies concerning the dates and/or signatures that appear on the cards. The Respondents further contend that two additional cards should not be counted because they were signed by persons who were not part of the unit during the relevant period of time. As will be discussed, we agree with the judge that the Union achieved majority status in the live haul unit, but we find that such status was achieved as of June 28, and not March 31.

The parties stipulated that on March 31, 1989, there were 103

authorization cards and that the cards were authentic as to signatures and dates. The parties also stipulated that there were 201 unit employees at that time. The judge relied on the stipulation to find that on March 31, a majority of unit employees had authorized the Union to represent them by signing cards. We find, in agreement with the Respondents, that the judge erred in interpreting the stipulation as including majority status. Here, the plain meaning of the stipulation is that the parties agreed to the *authenticity* of the cards, i.e., that the cards were executed by those persons whose signatures appear on them and were signed on the dates indicated. See *Zero Corp.*, 262 NLRB 495, 499

(1982), enfd. mem. 705 F.2d 439 (1st Cir. 1983); *Ona Corp. v. NLRB*, 729 F.2d 713 (11th Cir. 1984).[33]

The Respondents maintain in their exceptions that Michael Sturgill's 1988 card[34] should not be counted because his first name is misspelled on the signature line and is printed, and because the handwriting on the signature line is not the same as the handwriting on the remainder of Sturgill's two cards. The Respondents also maintain that the name on a card

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[33] Our finding, based on the unambiguous language of the stipulation, is further supported by statements made at the hearing by the Respondents' counsel at the time the parties entered into the stipulation. He stated, "I mean whatever is the date on the card and the signature on the card is authentic."

[34] The 103 cards submitted by the General Counsel include two cards for Michael Sturgill (reflecting the same social security number), one dated February 7, 1988, and one dated July 16, 1989.

purportedly signed by Dennis Johnson is misspelled, and that another card displaying the name "Arnold Clonch" is signed by "Arnold Stanley," and, therefore, that these two cards should also be excluded. We find, however, that having stipulated to the authenticity of the cards, the Respondents cannot now question the authenticity of signatures that appear on them.[35] The Board has held that it is generally accepted that a stipulation is conclusive on the party making it, and prohibits any further dispute of the stipulated fact by that party or use of any evidence to disprove or contradict it. *Kroger Co.*, 211 NLRB 363, 364 (1974). Noting that the parties' stipulation is not ambiguous, we decline to discount any of the authorization cards on the basis of questions about their authenticity.

[35] See *Zero Corp.*, above, in which the authorization cards were authenticated at the hearing by a handwriting expert without objection from the respondent. The respondent later contended in its brief to the judge that many of the cards were invalid because the dates were not filled in by the signers. The Board found, however, that the respondent, having reexamined the cards, could not question their authenticity for the first time in its posthearing brief.

The Respondents next contend that three cards should not be counted because they were signed *after* the stipulated date of March 31: Timothy Williams' card dated June 26, 1989, Clifton Johnson's card dated June 28, 1989, and Michael Sturgill's card dated July 16, 1989. The Respondents also maintain that Sturgill's February 7, 1988 card should not be counted because it was signed before the

Union's organizing campaign began in December 1988. Where, as here, a bargaining order is based on violations of Section 8(a)(1) rather than on a demand for bargaining, bargaining is ordered as of the earliest possible date when both of the following conditions are met: the respondent has commenced its unlawful conduct *and* the union has attained majority status. See *Multimatic Products*, 288 NLRB 1279, 1321 fn. 278 (1988); *Ultra-Sonic De-Burring*, 233 NLRB 1060 fn. 1 (1977), enfd. 593 F.2d 123 (9th Cir. 1979). Thus, in this case, despite the stipulated date of March 31, which the judge interpreted as the date of majority status, he ordered bargaining from April 3, which he found to be the

date the Respondents commenced their course of unlawful conduct. Further, although the parties have stipulated to the authenticity of the dates that appear on the cards (i.e., that the cards were signed on the dates that appear on them), an examination of those dates for the purpose of determining when the Union attained majority status concerns a legal question—and *not* matters relating to authenticity—that is properly before the Board now. See *Burger King*, 258 NLRB 1293, 1300 (1981), enfd. mem. sub nom. *NLRB v. Greyhound Food Management*, 709 F.2d 1506 (6th Cir. 1983).

Examining the dates on the cited cards, we agree with the Respondents that Michael Sturgill's 1988 card

should not be counted because it was not signed during the Union's organizing campaign. See *Fort Smith Outerwear*, 205 NLRB 592, 594 (1973), modified on other grounds 499 F.2d 223 (8th Cir. 1974).[36] Additionally, we find that the cards of Williams and Johnson and Sturgill's 1989 card should be counted toward majority status as of the dates that appear on them. Thus, after discounting Sturgill's 1988 card and counting Williams' card as of June 26 and Johnson's card as of June 28, we find that the Union attained a majority of

[36] In *Fort Smith*, the Board found that the General Counsel did not meet his burden of proving that the card was signed on a date other than that appearing on its face (December 3, 1970), which was not during the organizational campaign that commenced on November 30, 1971.

101 cards, in a unit of 201 employees, as of June 28.[37]

The Respondents also contend that the cards of two other employees should not be counted in determining majority status. According to the Respondents, Randy Nichols was terminated on May 3 and his card should not be used to determine majority status after that date. Additionally, they contend that the card signed by Harley J. Perry Jr. should not be counted because Perry had been employed as a guard since 1976, and therefore was not part of the unit. We have denied the Respondents' motion to reopen the record to admit

[37] In making this finding, we note that the Respondents in fact state in their brief that "the earliest possible date of the Union's majority status was June 28."

evidence relevant to the employment status of Perry and Nichols. The Respondents attribute their failure to raise the majority status before the judge to the General Counsel's failure "to reasonably ascertain the accuracy" of the authorization cards before introducing them into evidence. However, as discussed, the Respondents at the hearing stipulated to the authenticity of the cards and raised no issues concerning their validity. We find that the Respondents' failure to realize the significance of the evidence at the time of the hearing, and to present evidence which was apparently readily available at that time, does not constitute the sort of extraordinary circumstances that would warrant re-

opening the record under Section 102.48(d)(1) of the Board's Rules and Regulations. See *Superior Fast Freight*, 275 NLRB 329 fn. 1 (1985).[38]

Having found that the Union attained majority status in the live haul unit as of June 28, we agree with the judge that a bargaining order is warranted. In determining whether a bargaining order is appropriate to protect employee sentiments and to remedy an employer's misconduct, the Board examines the nature and pervasiveness of the employer's practices. In weighing a violation's

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[38] Moreover, noting that the Respondents contend that Perry was not a unit employee and that Nichols was not a unit employee after May 3, we find that even if their cards were not counted toward a determination of majority status, the Union would have attained a majority of 100 cards in a smaller unit of 199 employees by July 16, the date of Sturgill's second card.

pervasiveness, relevant considerations include the number of employees directly affected by the violation, the size of the unit, the extent of dissemination among the work force, and the identity of the perpetrator of the unfair labor practice. *FJN Mfg.*, 305 NLRB No. 79, slip op. at 5 (Nov. 21, 1991).

In finding a bargaining order appropriate here, we rely particularly on Respondent Holly Farms' unlawful grant of economic benefits to the live haul employees, conduct which was also emphasized by the judge. We have also adopted the judge's finding that following the Unions' certification in the drivers and yardmen unit, Live Haul Manager Lovette engaged in a pervasive pattern of unlawful in-

terrogations, solicitations, and promises to remedy grievances among the live haul employees. The judge found that in response to concerns expressed by live haul employees about inadequate pay due to their 4-day workweek, Respondent Holly Farms increased their work hours beginning in May. Addressing the same employee concerns was the Respondents' July 2 wage increase, which we have found to be coercive. The solicitation of grievances and promises to remedy them and the grant of wage increases have a strong coercive effect on employee freedom of choice because they eliminate primary reasons for organization. *Montgomery Ward & Co.*, 288 NLRB 126, 129 (1988), enf. denied on other grounds 904 F.2d 1156 (7th Cir.

1990). Additionally, wage increases in particular have been recognized as having a potential long-lasting effect, not only because of their significance to employees, but also because the Board's traditional remedies do not require a respondent to withdraw benefits. *Color Tech Corp.*, 286 NLRB 476, 477 (1987).[39] As the judge in this case discussed, because the increases regularly appear in paychecks, they are a continuing reminder that "the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not

[39] See also *Pembrook Management*, 296 NLRB 1226, 1228 (1989), in which the Board discussed cases in which bargaining orders were given based solely on the grant of wage increases in reaction to union organizing campaigns.

obliged." *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). Significantly, in terms of pervasiveness, the Respondents' wage increase affected all the unit employees.[40]

For these reasons, we find that the Respondents' unfair labor practices affecting the live haul employees had the tendency to undermine majority strength and impede the election processes, thereby rendering it unlikely that traditional remedies would erase the effects of the unlaw-

[40] We reject the Respondents' contention that the wage increase and workweek extension cannot be characterized as either serious or pervasive because they occurred after the March 27 dismissal of the representation petition in the live haul unit and at a time when Respondent Holly Farms believed that no election was pending in the live haul unit. Although conduct does not have to occur during the critical period to be relevant to determination of whether a *Gissel* bargaining order is appropriate, we note that here the unlawful economic changes in fact occurred *after* the representation petition had been reinstated on April 28.

ful conduct and ensure the conduct of a fair election. *NLRB v. Gissel Packing Co.*, above.

We further find, in agreement with the judge, that under the circumstances here, the Respondents' unfair labor practices directed against employees in other units provide further support for the issuance of a bargaining order in the live haul unit. The judge found, and we agree, that it is appropriate to consider these unfair labor practices for the following reasons: (1) the Respondents' conduct was concentrated and principally affected employees in the Wilkesboro complex where the live haul facilities were contiguous with the plants and, before the integration, were contiguous with the east-

ern division transportation department; (2) the Respondents' labor relations policies were centrally controlled and the September withdrawal of recognition from the Unions was overt and highly publicized; and (3) the Respondents did not try to conceal from the live haul employees their unlawful conduct affecting employees in other units, and in fact called some of that conduct to the attention of the live haul employees in order to discourage their union activities. Regarding the latter, the judge found that Vice President Lankford told live haul employees about the arrests of the drivers for

engaging in union handbilling in the parking lots.[41]

As found by the judge, the unfair labor practices directed at nonunit employees included threats of closure and job loss by high level officials, as well as the unlawful discharge of four employees for engaging in pro-union activities on nonworktime in nonwork areas. The Board has emphasized, with court approval, that threats of plant closure and discharge not only are "hallmark" violations, but are among the most fla-

[41] We do not, however, rely on the judge's citation to *J. P. Stevens*, above, which we find to be factually distinguishable.

Cf. *Action Auto Stores*, 298 NLRB 875 (1990) (bargaining order given at each of the nine stores involved in the election based on unfair labor practices at six of those stores, even in the absence of a finding that knowledge of the respondent's actions was disseminated).

grant of unfair labor practices. *Q-1 Motor Express*, 308 NLRB No. 185, slip op. at 3-4 (Sept. 30, 1992) (and cases cited therein). Further, the Respondents' unlawful 8(a)(5) conduct with respect to the drivers and yardmen unit following the Tyson purchase, including the unlawful withdrawal of recognition and imposition of Tyson terms and conditions of employment, were conspicuous and pervasive and positioned the Respondents to gain an advantage in the event of a new election.[42]

We also find, contrary to the Respondents' contention, that evidence

[42] In view of the totality of the Respondents' unlawful conduct, which was both serious and pervasive, we reject the Respondents' reliance on the election tally to support its contention that a bargaining order is not warranted because the Union's majority status was not dissipated. Cf. *Eddyleon Chocolate Co.*, 301 NLRB 887 (1991).

concerning employee turnover is an irrelevant consideration when assessing the propriety of issuing a *Gissel* bargaining order and, even if considered, would not require a different result. See *F & R Meat Co.*, 296 NLRB 759 (1989). Finally, we note that the Respondents have presented no evidence to support their contention that a bargaining order is not appropriate because there have been changes in management.[43]

Accordingly, we agree with the judge that the possibility of erasing the effects of the Respondents' extensive and serious violations is slight and the holding of a fair re-

[43] As indicated, we have denied the Respondents' motion to reopen the record to present evidence regarding employee turnover and a change in management of the live haul employees.

run election unlikely. Therefore, we conclude that a *Gissel* bargaining order is appropriate as of June 28, the date by which we have found the Union attained majority status in the live haul unit.[44]

CONCLUSIONS OF LAW

1. The Respondents, Tyson Foods, Inc./Holly Farms Corporation, each are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

[44] Among the unlawful unilateral changes found by the judge was the Respondents' October 1 change in the absentee policy for live haul employees. The Respondents contend that although the judge set forth the facts relating to this allegation, he did not explicate the basis for his finding, appearing only in the Conclusions of Law, that this change was unlawful. Relying on our imposition of a bargaining order in the live haul unit, we find that the Respondents had an obligation to bargain with the Union before changing the absentee policy. We therefore find, in agreement with the judge, that the Respondents violated Sec. 8(a)(5) and (1) by unilaterally changing the policy.

2. Respondent Tyson Foods, Inc., at all material times since July 18, 1989, has been the successor to and proprietor of Respondent Holly Farms Corporation, succeeding to Holly Farms' bargaining obligation with the labor organizations named below, and shares with Holly Farms joint and several liability to remedy Holly Farms' unfair labor practices.

3. Chauffeurs, Teamsters and Helpers Local Unions Nos. 29, 71, 355, 391, 592, 657, and 988, affiliated with International Brotherhood of Teamsters, AFL-CIO (the Unions) are labor organizations within the meaning of Section 2(5) of the Act.

4. The Respondents violated Section 8(a)(1) of the Act by:

(a) Repeatedly threatening their long-distance drivers that the transportation department in which they were employed would be closed if they chose the Unions as their bargaining agent.

(b) Repeatedly threatening their long-distance drivers that if the Unions won, or even lost, the forthcoming representation election, the Respondents would take away the employees' jobs by selling all their trucks and by contracting out their hauling work.

(c) Repeatedly soliciting grievances from their employees and promising directly, or by implication, to adjust them in order to induce their employees to abandon the Unions.

(d) Telling their employees that it would be futile for them to support the Unions.

(e) Repeatedly threatening their employees with unspecified reprisals for having supported the Unions.

(f) Telling their employees to abandon the Unions in favor of forming a committee to negotiate with management concerning terms and conditions of employment.

(g) Promulgating, maintaining, and disparately enforcing a rule which prohibits employees from distributing materials in nonwork areas on the Respondents' property during nonwork hours.

(h) Threatening to arrest their employees for distributing union mate-

rials in nonwork areas on the Respondents' property during nonwork hours.

(i) Informing their employees that other employees had been arrested for distributing union materials in nonwork areas of the Respondents' premises during nonwork hours.

(j) Threatening their employees with discharge should they distribute union materials in nonwork areas of the Respondents' premises during nonwork hours.

(k) Promulgating, maintaining, and enforcing a rule which prohibited their employees from discussing wages with other employees.

(l) Threatening to retaliate against their employees by assigning them less mileage, thereby reducing earnings, because they chose the

Unions as their bargaining representative.

(m) Repeatedly coercively interrogating their employees concerning their union activities, sympathies, and desires.

(n) Threatening employees with retaliation for wearing union hats.

(o) Threatening their employees with discharge if they should choose the Unions as their bargaining agent.

(p) Threatening their employees that other employees who were prominently active for Local 391 would be discharged should the employees not choose the Union as their bargaining agent.

(q) Threatening their employees that the Respondents' management would know how they voted in the

scheduled representation election should they chose Local 391 to be their bargaining agent.

5. The Respondents, in order to discourage union membership and activities, violated Section 8(a)(3) and (1) of the Act by:

(a) Discriminatorily discharging their employees Alvin Bouchelle, Patricia Barker, Raymond K. Huffman Jr., and Joseph Richardson.

(b) Discriminatorily disciplining their employees James Phillip Church, Gene Hester, Teddy Ray Hayes, and Harden Branscome by the issuance of written warnings.

(c) Causing employees to be arrested for distributing union materials in nonwork areas on the Respondents' property during nonworktime.

(d) Discriminatorily granting their live haul unit employees a pay raise shortly before a scheduled representation election.

6. The following employees of the Respondents constitute an appropriate unit for bargaining under Section 9 (a) of the Act:

> All driver employees and yardmen employed by Tyson Foods, Inc./Holly Farms Corporation who regularly are dispatched for outhauls through those Companies' terminals at Wilkesboro, North Carolina, and Carthage, Texas, and all yardmen employed at those Companies' facilities in Wilkesboro and Monroe, North Carolina; Glen Allen, Harrisonburg, and Temperanceville, Virginia; and Carthage, Seguin, and Center, Texas, excluding all office clerical employees, guards and supervisors as defined in the Act.

7. At all times since March 24, 1989, the seven above-named Teamsters

Local Unions (the Unions) have been, and are, the exclusive jointly certified representative of the employees in the above-described unit for purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

8. The Respondents violated Section 8(a)(5) and (1) of the Act by:

(a) Refusing to bargain about the September 12, 1989 offer of employment to the Holly Farms unit employees as an effect of the integration decision.

(b) Unlawfully conditioning employment on the acceptance of Tyson terms and conditions of employment, thereby discharging the following employees:

Earl Howell
Fred Royal

Gene Harris
Danny Osborne
Bill Ray Johnston
Dan Wingler
Ray Kanupp
George Glass
Bryant Welborn
James Spicer
Mike Hamby
Mike Maudlin
Thomas Alexander
Larry Eldreth
Donnie McClary
David Anderson
Butch Miller
Gene Hester
James Sparks
George Barber
Teddy Ray Hayes
Steve Eller
Curtis Eastridge
Donald Dollar
Jerry Fisher
R. J. Absher
Clark McNeil
Earl Eller
Jerry Blackburn
Kenneth Eller
Sam Badgett
Robert Crook
Harden Branscome
Bill St. John
Mike Dancy
Thomas Roope
David Laney
Zane Filipic
Denny Patrick
Romey Nelson
David or Danny Howell
Jerry Mealy

Patrick Owens
Donnie Blackburn
Jerry Miller
Michael Simmons
Mike Staley

(c) Bypassing the Unions and negotiating directly with unit employees concerning their wages, hours, and other terms and conditions of employment.

(d) Unilaterally changing the wages, hours, work locations, and other terms and conditions of employees in the above-described unit.

(e) Withdrawing recognition from the Unions as the exclusive collective-bargaining representative of the employees in the above-described unit and, thereafter, by failing and refusing to recognize the Unions as the exclusive collective-bargaining representative of the unit employees.

(f) Failing and refusing to provide the Unions with a copy of the requested merger agreement between Tyson Foods, Inc. and Holly Fars Corporation.

(g) Unilaterally changing the absentee policy as to when live haul employees must report their absences to the Respondents to avoid discharge.

9. The strike that began on October 1, 1989, is a protected unfair labor practice strike caused by the Respondents' above-described unfair labor practices.

10. The following unit is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All live haul employees (chicken catching crews)

> employed at the processing facility of the Respondents located at Wilkesboro, North Carolina, and feed haul, feed mill, and service center employees employed at the facility of the Respondents located at Roaring River, North Carolina, excluding all office clerical employees, guards and supervisors as defined in the Act.

11. On or about June 28, 1989, Local Union No. 391, affiliated with International Brotherhood of Teamsters, AFL-CIO (the Union), separately represented a majority of the employees in the unit described immediately above and, since that date, has been the exclusive representative of all such employees for purposes of collective bargaining.

12. By virtue of its unfair labor practices, the Respondents have attempted to undermine the Union's ma-

jority status and have precluded the holding of a fair rerun election, thereby making a bargaining order an appropriate remedy.

13. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

14. The Respondents' unlawful conduct interfered with the representation election held on July 27, 1989, in Case 11-RC-5583.

AMENDED REMEDY

1. Substitute the following for line 16 of paragraph 3 of the judge's remedy:

> "to those employees sums equal to the difference between what they would have earned from mileage."

2. In paragraphs 4 and 6 of the judge's remedy, change all references

to "constructive discharges" to "discharges."

3. Delete paragraph 8 of the judge's remedy.

4. Substitute the following for paragraph 9 of the judge's remedy:

> "Having found that the Respondents unlawfully changed the absentee policy with respect to live haul employees, the Respondents should, on request, rescind the unilaterally changed policy and baryain with Local 391 regarding absentee call-in requirements."

ORDER

The National Labor Relations Board orders that the Respondents, Holly Farms Corporation and Tyson Foods, Inc., Wilkesboro, Monroe, and Roaring River, North Carolina; Glen Allen, Harrisonburg, and Temperanceville, Virginia; and Center, Seguin, and Carthage, Texas, their officers,

agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening their employees that the departments in which they are employed will be closed if they should choose Chauffeurs, Teamsters and Helpers Local Unions Nos. 29, 71, 355, 391, 657, 592, and 988, affiliated with International Brotherhood of Teamsters, AFL-CIO (the Unions), or any other labor organization, as their bargaining agent.

(b) Threatening their employees that, whether or not they choose the Unions as their bargaining agent, the Respondents will take away their jobs by selling the trucks they drive and by subcontracting their hauling work.

(c) Soliciting grievances from their employees and promising, directly or by implication, to adjust them in order to induce their employees to abandon the Unions.

(d) Informing their employees that it would be futile for them to join or support the Unions, or any other labor organization.

(e) Threatening their employees with unspecified reprisals for having supported the Unions.

(f) Advising their employees to abandon the Unions in favor of forming a committee to negotiate with the Respondents with respect to wages, hours, and other terms and conditions of employment.

(g) Establishing, maintaining, and disparately enforcing a rule which

prohibits their employees from distributing union materials in nonwork areas of the Respondents' premises during nonwork hours.

(h) Respectively, threatening their employees with arrest and causing their employees to be arrested for distributing union materials in nonwork areas of the Respondents' premises during nonwork hours.

(i) Informing their employees that other employees had been arrested for distributing union materials in nonwork areas of the Respondents' premises during nonwork hours.

(j) Threatening their employees with discharge should they distribute union materials in nonwork areas of the Respondents' premises during nonwork hours.

(k) Establishing, maintaining, and enforcing a rule which prohibits their employees from discussing their pay rates with each other.

(l) Retaliating against their employees by assigning them less mileage, and thereby lessening earnings, because they chose the Unions as their bargaining representative.

(m) Coercively interrogating their employees concerning their union activities, sympathies, and desires.

(n) Threatening employees with retaliation for wearing union hats.

(o) Threatening their employees with discharge should they choose the Unions as their collective-bargaining agent.

(p) Threatening their employees that other employees who were active

for Local 391 would be discharged should the employees not choose that Union as their bargaining agent.

(q) Threatening their employees that the Respondents' management would know how they voted in a scheduled representation election should they choose a union as their bargaining agent.

(r) Discouraging membership in a labor organization by discharging employees, issuing written warnings to their employees for engaging in union activities, and discriminatorily granting their employees special pay raises.

(s) Conditioning employment on the acceptance of unlawful unilaterally imposed terms and conditions of em-

ployment, thereby discharging employees.

(t) Refusing to recognize and, on request, to bargain with the above-named Unions as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All driver employees and yardmen employed by Tyson Foods, Inc./Holly Farms Corporation who regularly are dispatched for outhauls through those Companies' terminals at Wilkesboro, North Carolina, and Carthage, Texas, and all yardmen employed at those Companies' facilities in Wilkesboro and Monroe, North Carolina; Glen Allen, Harrisonburg, and Temperanceville, Virginia; and Carthage, Seguin, and Center, Texas, excluding all office clerical employees, guards and supervisors, as defined in the Act.

(u) Refusing to bargain with the Unions about offering employment to

unit employees under changed terms and conditions of employment as an effect of the integration decision.

(v) Refusing to bargain with the Unions by bypassing the Unions and negotiating directly with unit employees concerning wages, hours, and other terms and conditions of employment; unilaterally changing wages, hours, and terms and conditions of employment; withdrawing recognition from the Unions; and failing and refusing to provide the Unions with a copy of the merger agreement.

(w) Unilaterally changing the absence policy for live haul employees.

(x) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights

guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and bargain, on request, with Teamsters Local Unions Nos. 29, 71, 355, 391, 592, 657, and 988 as the exclusive collective-bargaining representative of their employees in the drivers and yardmen bargaining unit with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Offer Patricia Barker, Raymond K. Huffman, Jr., Alvin Bouchelle, Joseph Richardson, and the 47 employees whose employment was unlawfully

conditioned, immediate reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings and other benefits resulting from their unlawful action against them in the manner set forth in the remedy section of the judge's decision, as amended. The 47 discharged employees entitled to this remedy are:

Earl Howell
Fred Royal
Gene Harris
Danny Osborne
Bill Ray Johnston
Dan Wingler
Ray Kanupp
George Glass
Bryant Welborn
James Spicer
Mike Hamby
Mike Maudlin

Thomas Alexander
Larry Eldreth
Donnie McClary
David Anderson
Butch Miller
Gene Hester
James Sparks
George Barber
Teddy Ray Hayes
Steve Eller
Curtis Eastridge
Donald Dollar
Jerry Fisher
R. J. Absher
Clark McNeil
Earl Eller
Jerry Blackburn
Kenneth Eller
Sam Badgett
Robert Crook
Harden Branscome
Bill St. John
Mike Dancy
Thomas Roope
David Laney
Zane Filipic
Denny Patrick
Romey Nelson
David or Danny Howell
Jerry Mealy
Patrick Owens
Donnie Blackburn
Jerry Miller
Michael Simmons
Mike Staley

(c) Rescind the written warnings previously given to James Phillip

Church, Gene Hester, Teddy Ray Hayes, and Harden Branscome, and remove from their records any reference to the above discharges, written warnings, and any disciplinary action taken pursuant to unlawfully changed policies or work rules, and notify each affected employee, in writing, that this has been done and that such discharges, written warnings, and/or discipline shall not be used against them in any way.

(d) On request, rescind the unilateral changes concerning rates of pay, hours of work, road fees, job benefits, and other terms and conditions of employment made on and after September 22, 1989, affecting employees in the drivers and yardmen unit, retroactively to September 22, 1989,

or whenever such changes became effective, except that employees need not be relocated, and make the unit employees whole, with interest, for any losses sustained due to the Respondents' unlawfully imposed changes in wage rates, hours of work, road fees, job benefits, and other terms and conditions of employment, since the effective dates of these unlawful changes, in the manner set forth in the remedy section of the judge's decision, as amended.

(e) Recognize and bargain, on request, with Local 391 as the exclusive collective-bargaining representative of the employees in the following unit appropriate for bargaining with respect to wages, hours, and other terms and conditions of employ-

ment and, if an understanding is reached, embody such understanding in a signed agreement:

> All live haul employees (chicken catching crews) employed at the processing facility of the Respondents located at Wilkesboro, North Carolina, and feed haul, feed mill, and service center employees employed at the facility of the Respondents located at Roaring River, North Carolina, excluding all office clerical employees, guards and supervisors as defined in the Act.

(f) On request, rescind the unilaterally changed absentee call-in policy requiring that, to avoid discharge or other discipline, live haul employees must communicate their absences to the Respondents within 2 days instead of 3 days, as before, and bargain with Local 391 concerning absentee call-in requirements.

(g) On unconditional application to return, offer to any employee who participated in the strike commencing October 1, 1989, full and immediate reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without loss of seniority and other rights and privileges, dismissing, if necessary, any person hired as a replacement on or after October 1, 1989. Further, make whole such employees, with interest, for any loss of earnings suffered by reason of the Respondents' refusal, if any, to reinstate them in the manner set forth in the remedy section of the judge's decision, as amended.

(h) On request, furnish the Unions a complete copy of the merger agree-

ment between Holly Farms Corporation and Tyson Foods, Inc.

(i) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(j) Post at all their various facilities including those in Wilkesboro, Roaring River, and Monroe, North Carolina; Harrisonburg, Temperanceville, and Glen Allen, Virginia; and Carthage, Seguin, and Center, Texas, copies of the attached notice

marked "Appendix."[45] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

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[45] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(k) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

Dated, Washington, D.C. May 28, 1993.

James M. Stephens, Chairman

Dennis M. Devaney, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER OVIATT, dissenting in part.

I agree with my colleagues' findings and conclusions except in the following significant respect.

Consistent with my concurrence and partial dissent in *Camsco Produce Co.*, 297 NLRB 905, 910 (1990), I find that the Respondents' live haul workers are agricultural laborers and are not covered by the Act.[46] I would thus dismiss all complaint allegations that allege violations with respect to live haul workers.

In *Camsco*, to determine whether farm workers were employees under the Act or "agricultural laborers" excluded by Congress from the coverage of the Act, I applied a rule of substantiality and regularity. That is, farm workers, to be employees under the Act, must regularly handle or process a substantial amount of farm products grown by other than their own employer. Otherwise, they are

[46] I did not participate in the Board's decision in response to the Union's request for review of the Regional Director's decision in Case 11-RC-5583.

agricultural laborers excluded from the coverage of the Act.

Here, the workers in issue catch chickens and deliver them to the Respondents' Wilkesboro processing plant. During 1989, apparently deemed by the parties to be a representative year, the Respondents processed approximately 96 million chickens at the Wilkesboro plant. The Respondents purchased only 575,000 of those chickens—i.e., less than 1 percent—from outside sources. Thus, of the chickens handled by the live haul workers, less than 1 percent were raised by employers other than the Respondents.

The Respondents surely process an insubstantial percentage of chickens from outside sources. Therefore, al-

though the Respondents' live haul employees may regularly handle the chickens of other employers, they do not catch and transport a substantial number of chickens from employers other than their own.[47] The Board should find that the Respondents' live haul employees are agricultural laborers.

Further, as in my view these workers are excluded from the coverage of the Act, there is no basis for finding that the Respondents violated the Act in regard to them.

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[47] In *Camsco*, the employer grew, harvested, and packed mushrooms. It obtained about 4 percent of its mushrooms from other growers—it grew the rest itself. I concluded that the 4 percent obtained from other growers was an insubstantial amount. Thus, I concluded that the farm workers who sorted, graded and packed the employer's mushrooms were agricultural laborers excluded from the coverage of the Act.

Dated, Washington, D.C. May 28, 1993.

Clifford R. Oviatt, Jr., Member
NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the
United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain collectively, on request, with Chauffeurs, Teamsters and Helpers Local

Unions Nos. 29, 71, 355, 391, 657, 592, and 988, affiliated with International Brotherhood of Teamsters, AFL-CIO, as the exclusive joint bargaining representative of our employees in the following appropriate bargaining unit concerning wages, hours, and other terms and conditions of employment:

> All driver employees and yardmen employed by us who regularly are dispatched for outhauls through our terminals at Wilkesboro, North Carolina, and Carthage, Texas, and all yardmen employed at our facilities in Wilkesboro and Monroe, North Carolina; Glen Allen, Harrisonburg, and Temperanceville, Virginia; and Carthage, Seguin, and Center, Texas, excluding all office clerical employees, guards and supervisors, as defined in the Act.

WE WILL NOT threaten that the departments in which you are employed

will be closed should you choose the Unions, or any other labor organization, as your bargaining agent.

WE WILL NOT threaten that, whether or not you choose the Unions as your bargaining agent, we will take away your jobs by selling the trucks that you drive and by subcontracting your hauling work.

WE WILL NOT solicit grievances from you and promise, directly or by implication, to adjust them in order to induce you not to select the Unions as your bargaining agent.

WE WILL NOT inform you that it would be futile to join or support the Unions, or any other labor organization.

WE WILL NOT threaten you with unspecified reprisals for having sup-

ported the Unions, or any other labor organization.

WE WILL NOT advise you to stop supporting the Unions in favor of forming a committee to negotiate with our management with respect to wages, hours, and other terms and conditions of employment.

WE WILL NOT establish, maintain, and disparately enforce a rule which prohibits you from distributing union materials in nonwork areas of our premises during nonwork hours.

WE WILL NOT threaten you with arrest and WE WILL NOT cause you to be arrested for distributing union materials in nonwork areas of our premises during nonwork hours.

WE WILL NOT inform you that other employees have been arrested for dis-

tributing union materials in nonwork areas of our premises during nonwork hours.

WE WILL NOT threaten you with discharge should you distribute union materials in nonwork areas of our premises during nonwork hours.

WE WILL NOT establish, maintain, and enforce a rule which prohibits you from discussing your pay rates with other employees.

WE WILL NOT threaten to retaliate against you by assigning you less mileage, thereby lessening your earnings, because you selected the Unions as your bargaining agent.

WE WILL NOT coercively interrogate you concerning your union activities, sympathies, and desires.

WE WILL NOT threaten you with retaliation for wearing union hats.

WE WILL NOT threaten discharge should you choose the Unions as your collective-bargaining representative.

WE WILL NOT threaten that employees who were active for Local 391 will be discharged for their union activities should the employees not choose the Union as their bargaining agent.

WE WILL NOT threaten that our management will know how you voted in a scheduled representation election should you choose Local 391, or any other labor organization, to be your bargaining agent.

WE WILL NOT discourage membership in a labor organization by discharging you, issuing written warnings to you for engaging in union activities, or

discriminatorily granting you pay raises.

WE WILL NOT condition employment on the acceptance of unlawful unilaterally imposed terms and conditions of employment, thereby discharging employees.

WE WILL NOT refuse to bargain with the Unions about offering employment to unit employees under changed terms and conditions of employment as an effect of the integration decision.

WE WILL NOT refuse to bargain with the Unions by bypassing the Unions and negotiating directly with unit employees concerning wages, hours, and other terms and conditions of employment; unilaterally changing wages, hours, and terms and conditions of employment; withdrawing

recognition from the Unions; and failing and refusing to provide the Unions with a copy of the merger agreement.

WE WILL NOT unilaterally change the absentee policy for live haul employees.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, recognize and bargain with Teamsters Local Unions Nos. 29, 71, 355, 391, 657, 592, and 988 as the exclusive collective-bargaining representative of our employees in the drivers and yardmen unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understand-

ing is reached, embody such understanding in a signed agreement.

WE WILL, on request, recognize and bargain with Local 391 as the exclusive collective-bargaining representative of our employees in the following appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement:

> All live haul employees (chicken catching crews) employed at our processing facilities located at Wilkesboro, North Carolina, and feed haul, feed mill, and service center employees employed at our facility located at Roaring River, North Carolina, excluding all office clerical employees, guards and supervisors, as defined in the Act.

WE WILL offer Patricia Barker, Raymond K. Huffman, Jr., Alvin Bouchelle, and Joseph Richardson, whom we have unlawfully discharged, and the 47 employees named below, whose employment was unlawfully conditioned, reinstatement to their former positions and, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole, with interest, for any loss of earnings and other benefits they may have suffered by reason of our conduct against them, less any net interim earnings, plus interest. The 47 employees entitled to this remedy are:

Earl Howell
Fred Royal

Gene Harris
Danny Osborne
Bill Ray Johnston
Dan Wingler
Ray Kanupp
George Glass
Bryant Welborn
James Spicer
Mike Hamby
Mike Maudlin
Thomas Alexander
Larry Eldreth
Donnie McClary
David Anderson
Butch Miller
Gene Hester
James Sparks
George Barber
Teddy Ray Hayes
Steve Eller
Curtis Eastridge
Donald Dollar
Jerry Fisher
J. Absher
Clark McNeil
Earl Eller
Jerry Blackburn
Kenneth Eller
Sam Badgett
Robert Crook
Harden Branscome
Bill St. John
Mike Dancy
Thomas Roope
David Laney
Zane Filipic
Denny Patrick
Romey Nelson
David or Danny Howell
Jerry Mealy

Patrick Owens
Donnie Blackburn
Jerry Miller
Michael Simmons
Mike Staley

WE WILL rescind the discriminatory written warnings previously given to our employees, James Phillip Church, Gene Hester, Teddy Ray Hayes, and Harden Branscome.

WE WILL remove from our files any reference to the above discharges, written disciplinary notices, and any disciplinary action taken pursuant to unlawfully changed policies or work rules, and WE WILL notify the affected employees in writing that this has been done, and that we will not use the evidence removed against them in any way.

WE WILL, on request, rescind the unilateral changes concerning rates

of pay, hours of work, road fees, job benefits, and other terms and conditions of employment made on and after September 22, 1989, affecting our employees in the drivers and yardmen unit, retroactively to September 22, 1989, or to when such changes became effective, except that employees need not be relocated, and WE WILL make our employees whole, with interest, for any losses sustained due to our unlawfully imposed changes in wage rates, road fees, benefit plans, and other terms and conditions of employment, since the effective dates of these unlawful changes.

WE WILL, on request, furnish the Unions, in timely fashion, a copy of the merger agreement between Tyson

Foods, Inc. and Holly Farms Corporation.

WE WILL, on request, rescind our unilaterally changed absentee call-in policy requiring that, to avoid discharge or other discipline, live haul employees must call us to report absences within 2 days instead of 3 days, as before, and WE WILL bargain with Local 391 concerning absentee call-in requirements.

WE WILL, on unconditional application to return, offer to any employee who participated in the strike that began on October 1, 1989, full and immediate reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without loss of seniority and other rights and privi-

leges, dismissing, if necessary, any person hired as a replacement on or after October 1, 1989, and WE WILL make such employee whole, with interest, for any loss of earnings suffered by reason of our refusal, if any, to provide reinstatement.

HOLLY FARMS CORPORATION AND ITS SUCCESSOR, TYSON FOODS, INC.